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Supreme Court, U.S.
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No. ———

In the Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,
Petitioner,

v.

MICHIGAN PUBLIC SERVICE COMMISSION AND INDIANA MICHIGAN POWER COMPANY,
Respondents.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Indiana Michigan Power Company ("IMP") provides retail electric service in Michigan subject to the ratemaking jurisdiction of the Michigan Public Service Commission ("MPSC"). IMP is a party to a "Standard Contract" with the Department of Energy ("DOE") for the disposal of spent nuclear fuel ("SNF"). The Standard Contract resulted from enactment of the Nuclear Waste Policy Act of 1982 ("NWPA"). Both the NWPA and the Standard Contract required the utility to pay SNF fees to the DOE in exchange for DOE's unconditional obligation to dispose of SNF beginning January 31, 1998. *Indiana Michigan Power Company v. Department of Energy*, 88 F.3d 1272 (C.A. D.C., 1996). ("*Indiana Michigan*"); *Northern States Power Company et al v. DOE*, 128 F.3d 54 (1997) ("*Northern States*") The DOE has not begun SNF disposal and is in default of the Standard Contract.

In September 2003, IMP filed a rate case with the MPSC seeking approval of its Power Supply Cost Recovery ("PSCR") rate factors for the year 2004. IMP included its SNF fee costs under the Standard Contract in its PSCR rate request. The MPSC and Michigan Court of Appeals concluded that IMP's continued SNF fee payments under the Standard Contract must be deemed reasonable and prudent for inclusion in IMP's retail rates, and without protective conditions, because the fees "are mandated by federal law," despite the federal contract default.

Against this background, the question presented is:

1. Whether federal law preempts the Michigan Public Service Commission from exercising its historic police powers to protect the public interest and to regulate electric utility retail rates by adopting ratemaking remedies with respect to a utility's continued payment of SNF fees under the Standard Contract that is in long-term default?

PARTIES TO THE PROCEEDINGS

The following were the parties to the proceedings before the Michigan Court of Appeals:

1. Michigan Environmental Council ("MEC")

2. Public Interest Research Group in Michigan ("PIRGIM")

3. Michigan Public Service Commission ("MPSC")

4. Indiana Michigan Power Company ("IMP") which is a subsidiary of American Electric Power Company.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner MEC states that it has no parent corporations, no publicly held companies owning 10% or more of its stock, and no non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

The Michigan Environmental Council ("MEC") respectfully petitions the Court for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

OPINIONS BELOW

The Michigan Court of Appeals' Opinion (Petitioner's Appendix, 1a-16a) is reported at 738 N.W.2d 289 (2007). The MPSC opinion and order in Case No. U-13919, dated April 28, 2005 is attached (25a-43a). The MPSC's August 1, 2005, order denying Petitioners' Motion for Rehearing is attached (17a-24a).[1]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented involves the following constitutional and statutory (and federal contract) provisions:

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[1] The Michigan Court of Appeals' June 7, 2007 order denying Petitioner's Motion for Reconsideration (71a-72a); the Michigan Supreme Court's January 22, 2008 order denying Petitioner's Application for Leave to Appeal (69a-70a); and the Michigan Supreme Court's May 27, 2008 order denying Petitioner's Motion for Reconsideration and Motion for Stay (67a-68a) are attached.

The Supremacy Clause of the United States Constitution, Article VI, clause 2 provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

The Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101 *et seq.* ("NWPA"), relevant provisions (73a-97a), and the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste ("Standard Contract"), 10 C.F.R. § 961.11 *et seq.* (98a-138a).

Michigan's ratemaking statutes include Sections 6 and 6a of 1939 P.A. 3, M.C.L. 460.6 and 6a, as amended by 1982 P.A. 304, M.C.L. 460.6j *et seq.*, including Sections 6j, 6k, 6l, 6m, M.C.L. 460.6j-6m, ("Act 304") (139a-174a), procedural provisions of the Michigan Administrative Procedures Act, 1969 P.A. 306 ("APA"), including Sections 1, 3, 71-87, M.C.L. 24.201, 203, 271-287, (175a-190a).

STATEMENT

This case is the latest chapter in a long odyssey, comprising nearly a decade, in which Petitioner has sought protective ratemaking remedies on behalf of Michigan ratepayers before the MPSC and Michigan Courts to address the ongoing inclusion by nuclear utilities of SNF fees paid under the Standard Contract which is in long-term default. This is the first final

decision of the Michigan Courts on this issue that is reviewable in this Court.

Petitioner has consistently presented substantial expert evidence and briefing before the MPSC and Courts demonstrating that nuclear utilities serving Michigan have failed to carry their burden to establish that they have been reasonable and prudent in continuing to pay the SNF contract fees in the face of DOE's indefinite and continuing default.

In contrast, the utilities, including IMP, have relied upon an argument of federal preemption – that continued payment of the SNF contract fees is reasonable and prudent because the fee payments are "mandated by federal law".[2]

The MPSC and lower Court decisions, through an improper application of preemption and misunderstanding of federal precedent, have deprived ratepayers of administrative ratemaking remedies respecting costs incurred under the breached federal contract, and have dangerously circumscribed the MPSC's regulatory jurisdiction and authority to set just and reasonable rates and protect Michigan's retail ratepayers. Left undisturbed, the decisions below effectively undermine the ability of any state

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[2] Another contemporaneous MPSC case and Michigan Court of Appeals decision that has adopted this federal law preemption result, but by improperly applying "collateral estoppel" to the issue, based upon this case, is pending a decision on Petitioner's August 15, 2007 application for leave to appeal in the Michigan Supreme Court (see *In re Application of Detroit Edison*, 740 N.W.2d 685 (2007), ("*DECo*") (234a-280a, and specifically 267a).

commission to exercise its regulatory authority respecting the purely economic aspects of the costs of nuclear energy production and of spent nuclear fuel costs. The decisions below ignore and conflict with this Court's ruling in *Pacific Gas and Electric Co. v. Energy Resource Commission*, 461 U.S. 190 (1983), and ignore or misconstrue other federal precedent including *Indiana Michigan Power Company et al. v. Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996), ("*Indiana Michigan*"); *Northern States Power Company et al v. DOE*, 128 F.3d 54 (1997), ("*Northern States*") among other cases. As such, the decisions present recurring questions of national importance that require resolution by this Court.

The MPSC and lower Court decision also ignored long-standing precedent in Michigan that: (i) the MPSC possesses the authority and duty to protect ratepayers from an uneconomic or failed contract entered into by a utility by using its ratemaking power to disallow costs of the contract in rates (not by directing utility decision making); *Union Carbide v. Public Service Commission*, 428 N.W.2d 322 (1988), and (ii) the costs incurred by a utility pursuant to a federal statutory mandate does not necessarily govern the MPSC ratemaking determination concerning whether the costs should be includable in rates; *City of Detroit v. PSC*, 14 N.W.2d 784 (1944).

1. The Department of Energy's default under the Standard Contract.

Congress adopted the NWPA in 1982 to address the disposal of SNF (73a-97a). The NWPA was preceded by decades of promises by the federal government that

it would undertake responsibility to dispose of SNF, dating from the time of the Manhattan project and the 1950's "Atoms for Peace" program aimed at promoting the commercial generation of nuclear energy.

The NWPA included no provision indicating Congressional intent to affect, let alone preempt, state ratemaking authority over utilities providing retail electric service. The "Findings" and "Purposes" section of the NWPA, Section 111(a) and (b), 42 U.S.C. § 10131 (82a-85a) states that the costs of SNF disposal "should be the responsibility of the generators and owners of . . . spent fuel" and that one of the purposes of the NWPA is:

> " (4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel."

Under Section 302(a)(1) and (2), 42 U.S.C. § 10222(a)(1) and (2), the DOE Secretary is to enter into contracts "with any person who generates or holds title to . . . spent nuclear fuel. . ." and for ". . . disposal of . . . spent fuel", and further, that the contracts should provide for the "payment to the Secretary of fees" for "electricity generated . . . and sold . . . equal to 1.0 mil per kilowatt hour" (85a). Section 302(a)(5), 42 U.S.C. § 10222(a)(5) (87a), provides:

> "...(5) Contracts entered into under this section shall provide that—
>
> ...(B) in return for payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subtitle."

In 1983, the DOE promulgated its uniform "Standard Contract" to carry out the NWPA (98a-138a). The Standard Contract (Art II – Scope) stated (111a):

> ". . . .The services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF and/or HLW from the civilian nuclear power reactor . . . has been disposed of."

The Standard Contract (Article XI – Remedies) also preserved all contractual and legal remedies to enforce the Contract. ("Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law"). (129a).

Despite the statutory and contractual deadline for commencement of SNF disposal, the DOE on April 28, 1995, issued its *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (1995), absolving itself of any duty to dispose of SNF until it had access to a federal repository. In response, many utilities, states, and state utility regulatory agencies,

appealed to the United States Court of Appeals (D.C. Circuit), which reversed and vacated DOE's "Final Interpretation" in *Indiana Michigan*. The Court held that there was a reciprocal obligation between payment of the SNF fee and DOE's performance of its SNF disposal duties:

> ". . . we hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998."

Upon remand, the DOE did nothing to comply with the Court's directive. Because the 1998 deadline was fast approaching, the utility and state petitioners filed another case in the United States Court of Appeals seeking mandamus to require the DOE to comply with *Indiana Michigan*. In response, the Court issued its decision adopting a partial mandamus order in *Northern States* (128 F.3d at 761) reiterating its findings in *Indiana Michigan* . . . "that the NWPA imposes an unconditional obligation on the Department to begin disposal of the SNF by January 31, 1998.". The *Northern States* Court found that a full mandamus was not yet called for on the basis that damage suits against DOE in the United States Court of Claims may provide a "potentially adequate remedy". The *Northern States* Court did not foreclose other potential remedies that may be pursued later.

After *Northern States*, some nuclear utilities – including IMP – filed damage actions against DOE in the Court of Claims. However, while the Court of Claims can award damages for certain costs incurred by utilities arising from DOE's contract default, such

awards neither result in SNF disposal nor performance under the Standard Contract, nor do they protect the SNF fees that continue to be paid. Further, while a utility's claimed damages represent costs generally paid by ratepayers in rates, the Court of Claims has no power to ensure that ratepayers receive refunds from damage awards.

In 1983, IMP entered into the Standard Contract with the DOE for disposal of the SNF generated by IMP. IMP continues to pay the SNF fee, without any discernable protections or conditions, despite the more than ten-year default by DOE under the Standard Contract.

2. State retail ratemaking authority over SNF fee cost/rate issues.

The MPSC is granted the jurisdiction, authority, and duty to set retail rates for utilities pursuant to several statutes, including 1939 P.A. 3 ("Act 3") and Act 304, (139a-174a) among others. IMP is a nuclear utility serving retail electric customers in the State of Michigan.

General rate cases and Act 304 cases are classified as "contested cases", subject to prior notice and hearing, under both the above MPSC statutes and the Michigan Administrative Procedures Act, 1969 P.A. 306, MCL 24.201 *et seq.* (175a-190a). The APA provides parties to agency proceedings extensive rights to formal discovery, presentation of witnesses, cross-examination, written briefs, issuance of a Proposal For Decision ("PFD") by the Administrative Law Judge (ALJ), the right to file written exceptions thereto, and

an agency made "upon consideration of the record as a whole . . . and as supported by and in accordance with the competent, material, and substantial evidence". Art 6, Section 28, of Michigan's Constitution (191a) also places this latter requirement upon public agencies such as the MPSC.

Act 304 was adopted in 1982 to provide greatly enhanced scrutiny of utility fuel, purchased power, and related costs, on an annual basis. For electric utilities, these are called "power supply cost recovery" ("PSCR") cases.

Section 6a, M.C.L. 460.6a, (141a-144a), requires full evidentiary hearings in Act 304 and general rate cases. Section 6a requires a utility to "place in evidence facts relied upon to . . . increase its rates and charges" and "a reasonable opportunity for a full and complete hearing".

Section 6a provides that the MPSC

> "shall authorize a utility to recover the cost of fuel, purchased gas, or purchased power only to the extent that the purchases are reasonable and prudent."

Section 6j(1)(a) and (b), M.C.L. 460.6j(1)(a) and (b), of Act 304 (144a-145a), provides for PSCR clauses and rate factors:

> ". . . to allow the utility to recover costs . . . incurred under reasonable and prudent policies and practices."

Section 6j(3) states that "a utility annually shall file . . . a complete" PSCR plan describing the expected sources and changes in the cost of electric power supply, all major contracts and power supply arrangements to include the price of fuel, duration of the contract or arrangement, and related information "as required by the Commission, and "an explanation of the actions taken by the utility to minimize the cost of fuel to the utility." (145a-146a). Section 6j(6), requires the MPSC to evaluate the reasonableness and prudence of the decisions underlying the utility's PSCR plan, and to "approve, disapprove, or amend" the plan, and to consider . . . whether the utility has taken all appropriate actions to minimize the cost of fuel". (147a-148a).

Act 304's review process includes specifically nuclear fuel costs, including costs for SNF disposal. Section 6j(1)(a) refers to "transportation costs, reclamation costs, and **disposal and reprocessing costs, of fuel burned by the utility for electric generation**." (144a). Section 6j(13)(g) and (j) mandates that the MPSC in a PSCR reconciliation shall "disallow additional costs resulting from unreasonably or imprudently renegotiated fuel contracts" and to "disallow increases in charges for **nuclear fuel disposal** unless the utility has received the prior approval of the commission". (151a, 153a).

The Commission's jurisdiction to fully review SNF fee costs is clear under the plain language and purpose of Act 304.

3. IMP case before the MPSC and Michigan Court of Appeals.

On September 30, 2003, IMP filed this PSCR rate case for the calendar year 2004. IMP included in its PSCR costs for rate purposes the SNF fee paid under the Standard Contract for nuclear energy generated and sold. However, IMP's application and prefiled testimony did not explain or justify the inclusion in rates of the SNF fee.

Petitioner MEC[3] (jointly with PIRGIM) intervened, and sought extensive discovery from IMP to determine IMP's actions or non-actions in enforcing the Standard Contract, to protect the SNF fees, or to obtain SNF disposal. Petitioner's discovery sought to fully explore how IMP could claim that it was reasonable and prudent in continuing to pay the fees, without protective conditions, and to seek rate recovery in this case for the fees, in light of the long-term federal default under the Standard Contract. IMP objected to the discovery, and refused to answer, whereupon Petition filed a motion to compel, which the ALJ denied. Petitioners also prefiled the testimony and exhibits of its witness, Ronald C. Callen, an expert in nuclear energy, SNF disposal, and state and federal

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[3] MEC is a statewide environmental and consumer protection organization comprising over 70 public interest organizations representing some 200,000 Michigan utility ratepayers.

utility regulation.[4] IMP prefiled the testimony of its rebuttal witness, Douglas H. Malin.

Prior to the hearings, IMP filed a motion (and brief) to strike Petitioner's expert testimony and exhibits asserting that: (i) Petitioner's remedies were "beyond the scope of this proceeding" because the SNF fees mandated by 42 U.S.C. § 10222(2) and the Standard Contract were "legally unavoidable" such that "its recovery may not lawfully be precluded,"; (ii) that IMP had a "statutory and constitutional right" to "full cost recovery", and that any rate disallowance is "preempted" as a "conflict with the NWPA and congressional intent that the waste disposal fees should be born by customers/users of the power"; and (iii) that, "because the SNF fees are compulsory, there cannot be any reasonable argument that AEP is acting unreasonably or imprudently in paying the fee or requesting its collection from customers through the PSCR factor."

Petitioners filed a response to IMP's motion to strike taking exception to IMP's theory that SNF fee payments, without protective conditions, remain "mandated" by federal law (NWPA and Standard Contract) given the long-term contract default, and in view of the federal court rulings in *Indiana Michigan* and *Northern States* holding that the payment of fees

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[4] Mr. Callen has 15 years experience as a physicist in the nuclear industry followed by 25 years on the staff of the MPSC, two years as the first director of NARUC's (National Association of Regulatory Utility Commissioners) nuclear waste office in Washington, DC and eight (8) years as a consultant and witness in cases involving nuclear power and SNF matters.

was reciprocal to performance under the contract by 1998, and further, that even if the company should choose to pay the fees, the MPSC under its independent ratemaking authority may refuse to recognize the fees in rates, or adopt protective terms and conditions. Petitioners' response also asserted:

> ". . . IM Power should be required to establish some basis for the recovery of SNF fees in this case. IM Power had provided no information to establish that it is fully enforcing its contract with DOE or that it is seeking full remedies to protect the amount of fees being paid, in view of the federal default in 1998.

At the start of the agency hearings, the ALJ granted IMP's motion to strike Petitioner witness' testimony in part. Petitioner's witness Callen then presented the remaining unstricken portion of his testimony, which contained substantial evidence in opposition to including IMP's NSF fee payments in rates.

Mr. Callen recommended that the MPSC disallow IMP's SNF fee costs because of "the total lack of support or explanation for the inclusion of SNF fee [ ] costs in this case," and because:

> ". . . IM Power has not been reasonable and prudent with respect to the incurrence of these costs, and has failed to undertake necessary or sufficient action to mitigate or minimize these costs, or to seek protection of the amounts represented by said costs."

Petitioner's expert Callen detailed the substantial costs and risks placed on ratepayers from the federal contract default, and described the inadequacy of IMP's plan and forecast:

> "While IM Power has included in this plan and forecast [the SNF fee costs] IM Power's testimony and exhibits are devoid of any explanation concerning its handling of SNF issues and costs. Thus, there is no support for any finding that IM Power has been reasonable and prudent with respect to said matters . . . Since IM Power has failed to do so, the Commission should reject IM Power's PSCR plan and forecast."

The ALJ denied Petitioner's motion to strike IMP's rebuttal testimony, filed by IMP witness Malin, concerning SNF fee cost/rate issues. Over Petitioner's vigorous objection that witness Malin's testimony comprised scant legal conclusions by a non-lawyer, IMP witness Malin testified that IMP "had no practical alternatives other than to sign standard contracts with the DOE in order to obtain and maintain operating licenses", that any fee "nonpayment would result in interest charges and possible contract suspensions", and that "I&M is obligated to make payments to the DOE for . . . SNF fees or run the risk of severe consequences".

In post-hearing briefing, Petitioners continued to assert that the MPSC had the authority and duty to address the SNF fees issues and to protect ratepayers by a rate disallowance or by placing SNF fee collections from ratepayers in an escrow trust, among

other remedies. IMP again asserted preemption (i.e. that the MPSC was essentially powerless to do anything but to simply flow-through, without any protective conditions, the SNF fees in PSCR rates, because "the fees were federally mandated" and because non-payment would risk adverse actions to its nuclear plant license).

The ALJ's June 4, 2004 PFD (44a-66a) rejected Petitioners' evidence and briefing recommending a rate disallowance or an order requiring IMP to refile its case to establish the reasonableness and prudence of its SNF fee costs. (53a-58a). The ALJ (57a) ruled that "it remains reasonable and prudent for IMP's customers to continue paying into the Nuclear Waste Fund"[5] and that "[F]ailure to do so (by unilaterally escrowing those payments, as advocated by the MEC)[6] could result in the imposition of interest charges, lead to revocation of the utility's license to operate the Cook

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[5] The NWPA and Standard Contract provide for the "generators and owners" of SNF to pay into the Nuclear Waste Fund; the MPSC decides what shall be recovered in retail rates.

[6] Petitioner never argued that IMP should simply "unilaterally cease its payments of SNF fees"; instead, Petitioner asserted throughout, in accordance with Michigan judicial precedent (e.g. *Union Carbide, supra*), that the MPSC possessed the jurisdiction and duty to protect ratepayers through its ratemaking powers, and that it remained for utility management to determine its own course of action – such as continuing to pay the fees, or to seek relief before a court (or DOE itself) to protect its fee payments pending DOE's resolution of its contract default.

Nuclear Plant, and render I&M ineligible for someday using the DOE's permanent storage facility."[7]

On June 18, 2004, Petitioners filed exceptions to the PFD asserting that IMP was not reasonable and prudent in continuing to make SNF fee payments under a contract in long-term default, without any protective conditions or adequate enforcement of the contract, and particularly in light of the reciprocal obligations between the payment of the fee and commencement by DOE of SNF disposal by January 31, 1998. *Indiana Michigan, supra.* Petitioners asserted that the ongoing fees payments remain unprotected, and that IM Power's strategy of simply paying the fees indefinitely (without protective terms or conditions), despite indefinite non-performance under the contract, was not reasonable or prudent.

The MPSC's April 28, 2005 Opinion and Order (25a-43a) adopted IMP's position "that IM has not acted unreasonably or imprudently in its handling of SNF payments" and . . . that "nothing persuades the Commission that I&M should unilaterally cease its payment of SNF fees to the DOE at this time"[8] and "[T]o do so might risk . . . interest payments . . . suspension of the standard contract . . . and . . . non-

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[7] The PFD failed to explain how these "retaliatory actions" could be undertaken, or to recognize that IMP could seek to undertake various actions, including court actions under Article XI (Remedies) of the Standard Contract, to seek an escrow of the fees, with protections from retaliatory actions.

[8] See FN 6, Id.

renewal of I&M's nuclear plant license."[9] The order suggested that actions and risks "must be more fully examined, preferably in a generic proceeding . . ." (37a-38a).[10]

On August 1, 2005, the MPSC issued its order denying Petitioners' motion for rehearing (17a-24a), adopting IMP's position that the utility is "legally obligated to pay the SNF fees, in order to retain its nuclear plant license" and that "escrowing of the funds is disallowed under the standard contract."[11] (20a-21a).

Petitioners appealed the MPSC orders to the Michigan Court of Appeals reiterating the MPSC's authority and duty under Act 304 to protect ratepayers with respect to the SNF fees included in PSCR rates for a contract in long-term default, and making clear that the MPSC was not preempted from adopting ratemaking remedies relating to the SNF fees. Once again, the utility advanced its preemption argument: that the MPSC properly regarded IMP's continued payment of SNF fees as reasonable and prudent because payment was "mandated by federal law" and because non-payment would risk adverse action with its nuclear plant license.

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[9] See FN 7, Id.

[10] This suggestion rings hollow as the MPSC subsequently then dismissed Petitioner's generic complaint in MPSC Case U-13771 on these issues (see *infra*).

[11] The source of this MPSC legal finding is unknown.

On April 24, 2004, the Michigan Court of Appeals affirmed the Commission orders (1a-16a). The Court (6a and 9a) adopted the unexplained legal claims of IMP's non-lawyer witness as a basis for its decision (thereby confusing what should be a de novo court finding of law as being dependent upon a witness's opinion).

The Court (12a) ignored and eviscerated the federal court holding in *Indiana Michigan*:

> "*Indiana Michigan Power Co*, does not hold that a utility's payment of SNF disposal fees is contingent on the DOE's putting into operation a disposal facility no later than January 31, 1998. The payment of SNF fees by a utility is mandated by 42 USC 10222."

The Court's (11a-13a) "federal mandate" and "nuclear license" conclusions (handed down to the Court by IMP's non-lawyer witness) thus became the basis for the Court (and MPSC) being unable to find that IMP was "unreasonable or imprudent" (13a). In other words, because of the preemption ("federal mandate") no unreasonableness or imprudence could be found. So long as the "federal mandate" of payment of SNF fees is accepted as an unchangeable given, there can be no case in which the utility's payment of same would ever be unreasonable or imprudent.

In contradictory fashion, the lower Court then stated it was not ruling upon preemption:

> "Appellants argue that federal law does not preempt the PSC's ratemaking powers over

> SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption." (fn5, 13a).

The lower Court fails to explain how it could avoid review of the statutory and constitutional preemption issues presented to it on the basis of the MPSC orders when Michigan precedent holds that agencies such as the MPSC are not to decide constitutional issues, and the Courts are to review and decide statutory and constitutional questions on a de novo basis. *Universal Am-Can v. MPSC*, 494 N.W.2d 787 (1992); *City of Taylor v. The Detroit Edison Co.*, 715 N.W.2d 28 (2006).

The lower Court then returns to its preemption holding, by citing the federal statutory "mandate" and by relying on a case that dealt with the "federal filed rate doctrine":

> "Moreover, a state utility commission must allow, as a reasonable operating expense, a copy incurred pursuant to a federal statute, *ABATE v Public Service Comm*, 192 Mich App 19, 22-27; 480 NW2d 585 (1991) (holding that states must give effect to rates approved by the Federal Energy Regulatory Commission), and SNF fees paid by IMPCo are mandated by statute, 42 USC 10222(a)(2)." (fn 5, 13a).

The lower Court decided the preemption issue by adopting without scrutiny the utility's arguments (and the MPSC's conclusion) that SNF fee payments were mandated by federal law and that the utility's non

payment would risk adverse action on the company's nuclear plant license. (11a-13a)

4. The DECo case before the MPSC and Courts.

In 2003, several months before IMP's MPSC filing in this case, another Michigan utility, the Detroit Edison Company ("DECo"), filed a consolidated general rate case and Act 304 PSCR case. DECo's case proposed the continued inclusion in rates of its SNF fee costs under its Standard Contract.

MEC/PIRGIM intervened in the *DECo* case and challenged through expert testimony DECo's proposal to flow-through in rates the cost of the SNF fees (without protective conditions), in view of the federal default of the Standard Contract.

In post hearing briefing, Petitioners extensively briefed the legal authority showing that the MPSC was not preempted by federal law from invoking ratemaking remedies with respect to the SNF fee costs. In contrast, DECo argued that the MPSC was preempted from adopting ratemaking remedies respecting the SNF fee costs on the basis that the fees were "mandated by federal law".

The ALJ in *DECo* ruled in his PFD that MPSC ratemaking authority over the SNF fees was preempted (303a-308a). Petitioners filed exceptions to this ruling.

Despite the extensive evidence presented by Petitioner concerning the SNF fee cost/rate issue, and

the extensive briefing by Petitioners and DECo concerning the preemption issue, the MPSC's final order, in only four sentences, avoided making any substantive findings whatsoever, except to adopt the ALJ's preemption ruling (297a).

Upon appeal of the MPSC order in *DECo* to the Michigan Court of Appeals, Petitioner and DECo extensively briefed the SNF fee and preemption issues. The Court issued its July 3, 2007 decision *In re Application of Detroit Edison*, 740 N.W.2d 685 (2007) (267a) entirely side-stepping the preemption issue:

> "We note at the outset of our analysis of MEC's and PIRGIM's appeal that these same plaintiffs challenged the PSC's identical determination regarding spent nuclear fuel (SNF) issues in *In re Application of Indiana Michigan Power Co*, 275 Mich App 369; 738 NW2d 289 (2007). In *Indiana*, we rejected each and every legal challenge MEC and PIRGIM raise here. Therefore, for the reasons and on the grounds set forth in our decision in *Indiana* and under the doctrine of collateral estoppel, we reject all of plaintiff's arguments regarding the SNF-related issues and hold that the PSC properly rejected all of MEC/PIRGIM's SNF-related challenges."

The same judge authored the lower Court's decision in this case and the *DECo* case.[12] The *DECo* Court's *sua sponte* application of collateral estoppel to dispose of the SNF fee/preemption issues contravened established Michigan precedent that collateral estoppel does not apply to MPSC ratemaking cases. *Consumers Energy v. MPSC*, 707 N.W.2d 633 (2005). While the preemption issue was fully litigated before the MPSC (and the PSC adopted the ALJ's PFD finding in favor of preemption), the Court also nevertheless abdicated its duty to undertake de novo court review of the constitutional issue. *Universal Am-Can v. MPSC, supra*. The *DECo* Court's application of collateral estoppel in this fashion also disregarded the procedures set forth in the Michigan Court Rules, M.C.R. 7.215(J) (192a-195a) for departing from established binding precedent. In contradictory fashion, the Court in *IM Power* (this case) also stated it did not rule on preemption because the MPSC did not, while the Court avoided ruling on preemption in *DECo*, where the MPSC adopted the ALJ's finding in favor of preemption.

5. MPSC and Court cases involving CECo.

Petitioners also intervened in the 2004 PSCR case filed by another Michigan nuclear utility, Consumers Energy Company ("CECo"). Petitioner in evidence and briefing challenged CECo's inclusion in rates of CECo's

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[12] Petitioner's August 15, 2007 application for leave to appeal the *DECo* decision remains pending before the Michigan Supreme Court.

SNF contract fees, based upon similar grounds as presented in *IM Power* and *DECo*.

Petitioner appealed the MPSC order denying relief in CECo. Upon review, the Michigan Court of Appeals issued its April 1, 2008 unpublished decision (309a-347a) affirming the MPSC order based upon the Court's decisions in *IM Power* and *DECo* (345a-347a). Petitioner's subsequent application for leave to appeal to the Michigan Supreme Court is pending.

6. Generic Complaint regarding SNF cost/rate issues.

On March 26, 2003, Petitioner MEC (and other joint parties) filed a comprehensive generic Complaint in MPSC Case No. U-13771, naming as Respondents the five nuclear utilities then serving Michigan ratepayers, concerning SNF fee cost/rate issues and requesting the MPSC to impose several remedies to protect ratepayers. (374a-459a).

The five respondent utilities, including IMP, DECo, CECo, and two Wisconsin utilities, filed motions and briefs seeking dismissal of the Complaint on several grounds, including preemption. Following responsive briefs by Complainants, and hearings on the motions, the presiding ALJ issued her PFD (460a-571a) ruling that: (1) Petitioners had standing to bring the complaint (483a-512a); (2) the MPSC possessed the subject matter jurisdiction to consider the issues and remedies raised in the Complaint, and that MPSC authority is <u>not</u> preempted by federal law (512a-533a); and (3) that the Commission possessed jurisdiction under state law to grant the various remedies

requested in the Complaint (533a-560a). The PFD, however, recommended dismissal of the generic complaint without prejudice to a refiling of separate complaints against one or more of the respondents (570a-571a).

Upon the filing of exceptions and replies by all parties, the MPSC's September 20, 2005 order (572a-594a) adopted the ALJ's recommendation that the complaint be dismissed "without prejudice to refiling the complaint" (590a-592a). This result remained unchanged under the Commission's February 9, 2006 order denying complaint's motion for rehearing (595a-602a).[13]

7. The Wisconsin utility cases.

In 2000, Wisconsin Public Service Corporation (in MPSC Case No. U-12613) and Wisconsin Electric Power Company (in MPSC Case No. U-12615) filed Act 304 PSCR cases for the year 2001. In 2000, Wisconsin Electric also filed (in MPSC Case No. 12725) a general rate case.

Petitioner MEC (and PIRGIM) intervened in these cases and presented expert testimony and filed briefs urging the MPSC to investigate SNF cost/rate issues and to consider potential actions concerning same (but did not advocate a rate disallowance of SNF fee costs in rates).

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[13] By this time, however, Petitioner was engaged in the cases (discussed in subsection 3, 4, and 5 above) on the SNF cost/rate issues.

Upon appellate review in these cases, the Michigan Court of Appeals issued unpublished decisions affirming the MPSC decisions, (348a-357a and 358a-373a). These decisions were non-binding under the Michigan Court Rules (M.C.R. 7.215(C), 192a).

In one of these unpublished decisions, the Court (357a) stated:

> "The issues raised by plaintiffs are appropriate for consideration, but not in a power supply cost recovery plan case."

The Court never explained how the SNF cost/rate issues were not appropriate in a PSCR case when the utilities sought recovery for all of their SNF fee costs in the PSCR cases, and the PSCR statute (Act 304) expressly provides for scrutiny of nuclear fuel disposal costs, and provides remedies of rate review and disallowance.

The Court's unexplained finding was prescient in one aspect, however. As the course of litigation before the MPSC and Michigan Courts have transpired, there is no forum for ratepayers to seek meaningful review or rate remedies regarding the SNF fee cost/issues – in either a PSCR case (as here in *IM Power* or in *CECo, supra*), or in a general rate case (*DECo, supra*), or by a generic complaint case (U-13771). The reason for this absence of meaningful review is the agency's misguided belief that the efforts on behalf of ratepayers is futile on the basis the state regulatory commission is <u>preempted</u> from any action other than simply passing-through in retail rates a utility's SNF fee payments under the breached contract.

REASONS FOR GRANTING THE WRIT

The lower Court improperly affirmed the MPSC's circumscribed view of its own ratemaking authority respecting the economic regulation of nuclear power in a decision based on mistaken interpretations of federal statutes and decisions (*Indiana Michigan*, *Northern Power*, and *Pacific Gas and Electric, supra).*

The erroneous decision has far-reaching consequences: it impacts millions of citizens and billions of dollars of ratepayer derived funds; it has already been applied to other Michigan cases – the *DECo* and *CECo* case described above, and may infect regulatory commission and Court decisions in other states by undermining the explicit holding by federal courts that the SNF fee payments are reciprocal to DOE's obligation to dispose SNF.

This Court's review would resolve the confusion and uncertainty created by the decisions below with respect to state regulatory authority over the economic aspects of nuclear power.

1. The MPSC and Michigan Court of Appeals' decisions are contrary to decisions of this Court, the federal Court of Appeals, and lower federal courts.

The MPSC and Court decision below erroneously found that federal preemption of state ratemaking authority applies in this case. The decisions below do so by ignoring this Court's decision in *Pacific Gas & Electric v. Energy Resource Commission*, 461 U.S. 190 (1983), by misconstruing the U.S. Court of Appeals'

holdings in *Indiana Michigan* and *Northern States Power*, by misapplying the NWPA and Standard Contract, and by ignoring this Court's standards for determining federal preemption.

This Court in *Pacific Gas* held that state regulation with respect to the economic aspects of nuclear power, or to address the **economic** or **environmental** effects of nuclear generation and nuclear waste, are not preempted by federal law, including the NWPA and the Atomic Energy Act establishing NRC regulation. Thus, federal law does not foreclose state remedial or protective actions to protect ratepayers.

No dispute existed here that the SNF fee cost issues were squarely placed before the MPSC as a matter of state (not federal) retail electric regulation. Thus, the MPSC had the primary regulatory jurisdiction under state statutes to review this issue, in a manner fully consistent with Congress' demarcation in the regulation of utilities between the federal and state governments.[14]

The lower Court also misconstrued the NWPA. The fee mandate in 42 U.S.C. § 10222 is tied to the requirement in 42 U.S.C. § 10222 that the DOE Secretary enter into the Standard Contract. In other words, the statutory fee is required by the NWPA to be

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[14] Congress in Section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), expressly preserved state ratemaking and other regulation over retail electric sales. *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945); *New York v. Federal Energy Regulatory Comm'n*, 535 U.S. 1 (2002); *Detroit Edison v. FERC*, 334 F.3d 48 (2003).

included in the contract, and is then tied to the reciprocal obligation of payment of fees in exchange for commencement of SNF disposal by January 31, 1998 (42 U.S.C. § 10222(a)(5); *Indiana Michigan Power*). The statutory fee "mandate" is not a stand-alone requirement, but must be interpreted within the overall contractual context established in 42 U.S.C. § 10222.

Several federal courts have held that the DOE's obligation to dispose of spent nuclear fuel is only contractual. *Yankee Atomic Electric Co. v. United States*, 42 Fed. Cl. 223 (1998); *Consumers Energy Co. v. United States*, 57 Fed. Cl. 278 (2003); *Commonwealth Edison Co. v. United States*, 56 Fed. Cl. 652 (2003). If the NWPA obligated the utilities to enter into the contracts (and to pay the fee in exchange for commencement of SNF disposal by DOE by 1998) then the SNF fees are contractual in nature. This means that utilities are not limited to damage actions before the U.S. Court of Claims, but may exercise additional contractual remedies *preserved* by the Standard Contract (Article XI-Remedies, 129a), which could include a Court action to escrow the fees, to sue for restitution or specific performance, or to consider complementary self-held remedies.[15]

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[15] In *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 13436 (CA Fed 2000), the Court found that the administrative remedies provided for in the contract were inadequate and not applicable to the DOE's more significant breach. *See also Northern States Power Co. v. United States*, 224 F.3d 1361 (CA Fed 2000).

The lower Court also ignored the unequivocal ruling of the U.S. Court of Appeals in *Indiana Michigan Power* respecting the reciprocal nature of the SNF fee payment to DOE's performance under the Standard Contract. Instead, the Michigan court misconstrues the federal court's holding, and eviscerates its clear-cut holding. It engages in a linguistic sleight of hand when it moves from a sentence mischaracterizing Petitioners' argument to the assertion that payment of the NSF fees is mandated by statute: *"Indiana Michigan* [ ] does not hold that a utility's payment of SNF disposal fees is contingent on the DOE's putting into operation a disposal facility. . . The payment of SNF fees . . . is mandated by 42 USC 10222."

Neither the NWPA nor the Standard Contract provided for indefinite payment of the fees in exchange for indefinite non-performance of SNF disposal, as countenanced by the lower Court and MPSC. The NWPA and Standard Contract requires the **utility** to pay the SNF fee at least until January 31, 1998,[16] but is silent as to ratemaking.

Of course, even if the SNF fee were a separate stand-alone federal statutory mandate applicable to the utility, this does not mean that the MPSC as a state regulatory agency must *ipso facto* include the

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[16] Since DOE has defaulted in its reciprocal obligation, (i.e., payment of fees in exchange for DOE performance by January 31, 1998) there is no basis to simply assume that, on and after 1998, the utility SNF fee obligation continues indefinitely (without protective remedies).

costs of the fee in retail rates. Accord, *City of Detroit v. PSC*, 14 N.W.2d 784 (1944). Many costs may arise from federal mandates, but that does not necessarily translate into reasonable and prudent expenses to be recovered in rates.

The Michigan court also ignores the U.S. Court of Appeals' 1997 decision in *Northern States Power* that reinforced the court's ruling in *Indiana Michigan* and reiterated the conditional nature of DOE's contract obligation in exchange for the SNF fees being collected under the contract. The Court in *Northern States Power* did not foreclose other remedies, besides pursuing past damages in the U.S. Court of Claims, to either enforce the Standard Contract, or protect the fees paid thereunder, on a going forward basis. The Standard Contract also does not limit the remedies that a party to the contract can pursue to protect the fees being paid in the face of a default by the DOE.

The lower Court also misapplied the "federal filed rate doctrine" to this case, by citing the statutory fee and *ABATE v. Public Service Commission*, 192 Mich. App. 19, 22-27; 480 N.W.2d 589 (1991). The federal filed doctrine simply is not applicable here.[17] Unlike the *ABATE* case, the subject SNF fee costs of IMP are

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[17] The federal filed rate doctrine arose in cases such as *Mississippi Power and Light Co. v. Moore*, 487 U.S. 354, 372-376 (1988) and *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986) where, state ratemaking agencies sought to make their own cost and rate allocation determinations, different from those set by the Federal Energy Regulatory Commission ("FERC"), with respect to the rates of multi-state utilities regulated by the FERC.

not subject to FERC regulation but are reviewed under state (MPSC) retail regulation.

Contrary to the lower court here, the U.S. District Court in *Roedler et al. v. Dept of Energy et al.*, 1999 U.S. Dist Lexis 21613, (unpublished, 196a-234a), *affirmed, Roedler et al. v. DOE et al.*, 255 F.3d 1347 (2001), in a case where retail ratepayers sought refunds of SNF fees due to the contract default, held that, if any filed rate doctrine existed, it was with respect to the rates set by the Minnesota Public Utilities Commission ("MPUC"), which regulated the utility's retail rates. The same is true here.

The lower Court and MPSC decisions also improperly rest their result upon the unexplained claim that IMP would risk losing its license to operate its nuclear power plant if IMP refused to pay the SNF fees. In the present contract default context, it is untenable to suggest that the NRC or DOE could place itself in a superior position under the Standard Contract by penalizing or retaliating against a license holder for undertaking action to better enforce its contract or to protect the fees being paid under the failed contract.

The decisions below also fail to explain a basis for finding preemption under this Court's traditional preemption tests. This Court stated in *Schneidewind v. ANR Pipeline Co*, 485 U.S. 3293, 299-300 (1988):

> ". . . A pre-emption question requires an examination of congressional intent. . . . Congress explicitly may define the extent to which its enactments pre-empt state law."

The decisions below cite no language in the NWPA or Atomic Energy Act (or the Standard Contract or NRC regulation) to establish any Congressional intent to preempt state ratemaking jurisdiction over retail electric utilities, or to review nuclear power or SNF costs.

Congress must be deemed to know how to preempt states' authority when it intends to do so. The plain language of the NWPA indicates no Congressional intent to preempt otherwise applicable state ratemaking authority over SNF costs. This conclusion is confirmed by the U.S. District decision, as affirmed by the U.S. Court of Appeals, in *Roedler, supra*, wherein the Court exhaustively reviewed the NWPA, the Standard Contract, and DOE regulations, and found that the NWPA required SNF fee and other costs to be paid by the "owners and generators" of SNF, and included no specific reference or obligation involving ratepayers (e.g. see NWPA Section 111, 42 U.S.C. § 10131, 83a-85a).

The Atomic Energy Act ("AEA"), 42 U.S.C. § 2011 *et seq.*, and NRC regulations also do not preempt state ratemaking authority on this issue. The NRC and state commissions operate in separate spheres of subject matter jurisdiction – the NRC on safety issues, with the state commissions overseeing retail rates.

This federal/state regulatory division is reflected in NRC regulations that recognize state commission regulation of costs, rate collections, and trust oversight, related to the decommissioning of nuclear

plants.[18] Recent amendments of NRC regulations expressly recognize state regulatory requirements to establish additional assurances and funding mechanisms, over and above those required by the NRC, to assure decommissioning and ultimate SNF disposal.[19] The NRC's 2002 rulemaking expressly stated that the NRC intends no preemption of state regulation, and in fact endorses state action to ensure funds or security for decommissioning (including extending it to SNF sites.) NRC's regulations concerning the preparation of management and financial plans to decommission SNF sites, and to manage SNF until it is transferred to the DOE for disposal,[20] also do not create preemption issues.

The MPSC and lower Court decision below also do not explain a basis for preemption under the concepts of "field" or "conflict" preemption (e.g. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)). As noted, Congress did not intend or provide for "field" preemption here, and state ratemaking authority is not ousted (e.g. *Pacific Gas & Electric*, NWPA, *Roedler*).

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[18] NRC regulations, including 10 C.F.R. § 50.75 and 10 C.F.R. § 72.30.

[19] Rules and Regulations, Nuclear Regulatory Commission, 10 C.F.R. Parts 50 and 72, RIN 3150-AG 52, Decommissioning Trust Provisions, 67 FR 78332 *et seq.*, 67 FR 78339-78344; December 24, 2002.

[20] 10 C.F.R. § 72.30(a) and (b), and 20 C.F.R. 50.54 (bb).

Similarly, no "conflict" preemption applies. The MPSC could have accepted all of Petitioners' remedies without creating any actual conflict or impossibility of compliance by IMP with both MPSC remedies and federal law. Indeed, MPSC's consideration and adoption of one or more of Petitioners' remedies would have promoted Congress' objectives and purposes because it would energize the utility to do more to enforce the Standard Contract and ensure the safe disposal of SNF in accordance with the NWPA and Atomic Energy Act, while also protecting ratepayers.

There is no merit to the lower court's or MPSC's remarks that Petitioners' remedies were "extraordinary" or beyond the scope of Act 304.[21] What is extraordinary is not Petitioners' ratemaking remedies, but rather the lack of adequate utility enforcement of its SNF contract, and the utility's continued payment of SNF fees without protection or condition in the face of DOE's long-term contractual default. Additionally, the remedies cannot be viewed as "extraordinary" given that the MPSC has in the past undertaken just such alternative remedies, without legal impediment, including rate investigations, establishment of an MPSC regulated trust for nuclear plant decommissioning and SNF fees for pre-1983 nuclear generation, rate or performance bonds as a pre-condition to rate increases, among other remedies. Michigan courts also have affirmed MPSC

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[21] The ALJ in the generic complaint case, U-13771, exhaustively reviewed Petitioners' remedies and found that the MPSC has the authority to adopt all of them (533a-560a).

decisions on rate disallowances ordered under Act 304.[22]

The MPSC and Michigan lower court decisions that state regulation must or should ignore the default in the Standard Contract, and DOE's non-performance, and to refuse any ratemaking remedies to protect the ratepayers with respect to the fee payments, merely based upon the holding that the "fee is mandated by statute" and "by the Standard Contract" is unwarranted and erroneous. Neither the NWPA or the Standard Contract envisioned indefinite payment of fees by utilities (without conditions or protections) in exchange for indefinite (or permanent) non-performance by the DOE.

Ratepayers in Michigan have been foreclosed from challenging SNF fee cost/rate issues – not through the required factual and legal findings based upon the evidentiary record and briefing arguments – but rather upon the overwhelming but mistaken perception of the MPSC (and lower Courts) that MPSC review and the rendering of rate remedies relative to the SNF fee costs are preempted by federal law. The Michigan Courts have now also sought to foreclose review and ratemaking remedies on a permanent basis – by applying the decision in this case to bar the issue from rate cases based upon "collateral estoppel".

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[22] In *Consumers Power v. MPSC*, 493 N.W.2d 424 (1992), the court affirmed an Act 304 disallowance to protect ratepayers from an uneconomic fuel contract.

Contrary to the utility's claims below, the existence of a "federal mandate" by itself does not control the MPSC's ratemaking power to make an appropriate rate adjustment, or to fully scrutinize the facts including the utility's actions and non-actions, and to adopt conditions and remedies to protect ratepayers. The MPSC has its own unfettered independent duty and power to protect ratepayers.

2. This case involves issues of significant national importance.

The preemption issue presented is of national significance and importance.

Congress adopted the NWPA to "at last" resolve the important question of SNF disposal, after decades of unclear strategies and unrealized promises by federal agencies concerning how and when this nation would dispose SNF. The NWPA committed the federal government to disposing SNF on a reliable basis by requiring a contract that included the reciprocal obligation of fee payments to fund a disposal program in exchange for actual performance by a date certain.

The years since passage of the NWPA in 1982, and the signing of contracts in 1983, have yielded disappointing results. The contract was not honored by DOE. The "firm" deadline for performance was first ignored and then voided by DOE's inaction. The only aspect of the contract to be performed on time has been the payment of SNF fees, funded by ratepayers through rates or charges.

The nation's ratepayers have paid nearly 30 billion dollars to fund contributions to the Nuclear Waste Fund for post-April 1983 nuclear generation, and in one-time fees for pre-1983 nuclear generation. (603a) Meanwhile, the promised date for commencement of SNF disposal shifts repeatedly forward and becomes ever more distant. Besides the SNF fees, the nation's ratepayers increasingly pay for duplicative costs incurred by nuclear utilities due to the default in the Standard Contract (i.e. payment of SNF fees plus incurring higher costs due to the default).

The DOE has been in default of its SNF disposal contract for over 10 years, and there is no credible estimate as to when, if ever, DOE contract performance will occur. A single state, presently selected by Congress for a potential SNF repository, has clogged agency and court processes with numerous lawsuits challenging SNF disposal. Yet the ratepayers in the 35 states where SNF is piling up in aging plants or in outside SNF "storage sites" have not had their interests adequately represented, and the temporary SNF storage sites were never intended nor designed to be long-term or permanent.

State regulatory commissions and their staffs in some instances have investigated the SNF fee/cost rate issues and the default in the Standard Contract, but are frequently met with the argument that state regulatory authority is preempted. At the same time, utilities have less incentive to fully pursue legal remedies to enforce the Contract and protect the SNF fees so long as they can comfortably pass-on all such fee costs in customer rates. This Court's ruling that state regulatory commissions may in fact review SNF

fee cost/rate issues pursuant to their rate jurisdiction over utilities would provide an enhanced incentive for utilities to undertake greater action and ratepayer interests would be better protected.

Utility damage actions in the U.S. Court of Claims, while they may return some past incremental costs to utilities caused by DOE's default, do not accomplish some important objectives: to actually accomplish SNF disposal, to protect the ongoing fee payments under the breached contract, to ensure refunds to ratepayers of damage awards received (to recognize these were for costs included in rates), to ameliorate duplicative costs being paid by ratepayers, or to engender some modicum of future compliance under the Contract.

The major lingering preemption issue should be faced and resolved so our nation's institutions and ratepayers may definitely know how and where to proceed. The issue should be resolved to stop the continued erosion of the NWPA's objectives and purposes, to enforce the Standard Contract, and to prevent the disregard and evisceration of this Court's holdings in *Pacific Gas*, and the ruling of the federal courts in *Indiana Michigan*, *Northern States*, and other cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CLARK HILL PLC
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Counsel of Record

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Counsel for Petitioner

Date: August 25, 2008

APPENDIX

APPENDIX A

COURT OF APPEALS MICHIGAN

Docket No. 264859

[Filed April 24, 2007]

In re APPLICATION of INDIANA MICHIGAN POWER CO. Michigan Environmental Council and Public Interest Research Group in Michigan, *Appellants,*	)
v.	)
Michigan Public Service Commission and Indiana Michigan Power Company, *Appellees.*	)

Submitted April 5, 2007, at Lansing.
Decided April 24, 2007, at 9:20 a.m.

Indiana Michigan Power Company (IMPCo) filed an application in the Public Service Commission (PSC) for approval of its 2004 power supply cost recovery (PSCR) plan, which included the cost of fees paid to the United States Department of Energy (DOE) for the disposal of spent nuclear fuel (SNF). The PSC approved the plan over the objections of Michigan Environmental Council (MEC) and Public Interest Research Group in

Michigan (PIRGIM), which contended that IMPCo had not acted reasonably and prudently by paying fees for nuclear waste disposal to the DOE despite the fact that no federal nuclear waste disposal program currently exists. The PSC denied a motion for rehearing, and MEC and PIRGIM appealed.

The Court of Appeals *held*:

1. Appellants' argument that the PSC's decision is unlawful and unreasonable because it does not comply with Const. 1963, art 6, § 28 and MCL 24.285 is unsubstantiated. The basis for the PSC's decision is set out clearly in its order approving IMPCo's PSCR plan, and in particular in its order denying appellants' petition for rehearing. IMPCo presented evidence that payment of SNF disposal fees was mandated by federal law, and that failure to make the payments could lead to imposition of interest charges and possible loss of its license to operate its nuclear facility. The PSC was entitled to rely on this evidence to conclude that, in the absence of evidence that IMPCo acted unreasonably and imprudently with regard to the collection of SNF costs, it had no authority to impose remedies such as those appellants suggested, and appellants identified no statute or caselaw to the contrary.

2. The PSC acted in accordance with its statutory authority in concluding that IMPCo had not acted unreasonably or imprudently by continuing to pay SNF fees in light of testimony that payment was required by law, that other utilities were making SNF payments, that failure to make the payments could result in the loss of its operating licence, and that it

had supported litigation to compel the federal government to fulfill its duties with respect to SNF disposal. The case on which appellants rely for the proposition that payment of SNF fees is no longer mandatory did not hold that a utility's payment of SNF fees is contingent on the existence of a disposal facility; rather, it held that the DOE had a duty to accept SNF from utilities despite the fact that there was not yet an operational disposal facility.

3. The PSC correctly concluded that considering the appellants' recommendations and proposed remedies was beyond the scope of its jurisdiction in the absence of a determination that IMPCo's actions were unreasonable or unlawful.

Affirmed.

Clark Hill PLC (by *Don L. Keskey*), Lansing, for the Michigan Environmental Council and the Public Interest Research Group in Michigan.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *David A. Voges*, *Michael A. Nickerson*, and *Patricia S. Barone*, Assistant Attorneys General, for the Public Service Commission.

Honigman Miller Schwartz and Cohn LLP (by *Richard J. Aaron*) for the Indiana Michigan Power Company.

Before: SAAD, P.J., and HOEKSTRA and SMOLENSKI, JJ.

SAAD, P.J. Michigan Environmental Council and Public Interest Research Group in Michigan appeal orders of the Michigan Public Service Commission (PSC) that approved the 2004 power supply cost recovery (PSCR) plan filed by Indiana Michigan Power Company (IMPCo) and denied appellants' petition for rehearing. We affirm.

I. INTRODUCTION

MCL 460.6j(2) authorizes the PSC to include a PSCR clause in a utility's rate schedule.[1] A PSCR clause is "a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a). Each year, a utility with a PSCR clause in its rate schedule must file a PSCR plan for the upcoming year and a five-year forecast of power supply requirements. MCL 460.6j(3) and (4). The PSC approves, disapproves, or modifies the proposed PSCR plan. MCL 460.6j(6). After the end of the year, the PSC conducts a reconciliation case in which it makes adjustments to take into account the utility's true cost of supplying power. MCL 460.6j(12) and (13).

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[1] MCL 460.6j was added by 1982 PA 304 (Act 304).

IMPCo owns and operates a nuclear generating plant that supplies electricity to customers in Michigan. Spent nuclear fuel (SNF) is stored at an on-site facility at the plant. IMPCo entered into a standard contract with the United States Department of Energy (DOE), as required by the Nuclear Waste Policy Act (NWPA), 42 U.S.C. 10101 *et seq.* Under such a contract, the utility pays a fee to the DOE for a federal SNF disposal program. This program was scheduled to begin no later than January 31, 1998. At the time the briefs were filed, the DOE estimated that the program would not begin before 2010.[2] The utilities classify the SNF fee as a nuclear fuel expense and include the cost in their PSCR plans.

II. UNDERLYING FACTS AND PROCEEDINGS

IMPCo filed an application with the PSC seeking approval of its PSCR plan for the year 2004. In the administrative proceeding, appellants presented the testimony of a nuclear energy consultant who asserted that ratepayers were being charged excessive costs associated with nuclear waste and its disposal, including the cost of the SNF fee paid by IMPCo to the DOE. The witness contended that IMPCo had not acted reasonably and prudently regarding its continued payment of the SNF fee because it had

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[2] We take judicial notice that the Department of Energy website currently states that, under the "Best-Achievable Repository Construction Schedule," the repository will not begin receipt of SNF until March 31, 2017. U.S. Department of Energy, Civilian Radioactive Waste Management < http:// www. ocrwm. doe. gov/ ym_ repository/ about_ project/ index. shtml> (accessed April 11, 2007).

failed to take necessary action to mitigate or minimize the costs, or to protect ratepayers from the risk of loss of the amounts paid. Appellants contend that IMPCo failed to enforce its contract with the DOE, and failed to undertake self-help remedies. The witness opined that the PSC should disallow inclusion of IMPCo's SNF expense in IMPCo's PSCR clause. Alternatively, appellants aver that IMPCo should be required to refile its case and explain its actions concerning the SNF fees.

IMPCo presented a witness who opined that the utility had acted reasonably and prudently with respect to the collection and payment of SNF fees. The witness testified that if IMPCo refused to pay the SNF fee to the DOE, the Nuclear Regulatory Commission could determine that IMPCo's SNF disposal program was not viable, and could refuse to license IMPCo's nuclear plant. The witness also said that IMPCo had engaged in self-help, including participating in litigation to attempt to force the DOE to adhere to its obligations under the standard contract.

The PSC approved the PSCR plan filed by IMPCo. The PSC noted that SNF costs resulted from disposal of nuclear fuel rods and that, pursuant to MCL 460.6j(1)(a), a utility was entitled to recover disposal costs through its PSCR clause. The PSC found that IMPCo did not act unreasonably or imprudently with respect to the handling of SNF issues; accepted IMPCo's assertion that to cease paying SNF fees to the DOE could result in consequences such as suspension of IMPCo's license to operate its nuclear facility; disagreed with appellants' contention that utilities, and not ratepayers, were responsible for payment of

SNF fees; and observed that it had rejected appellants' arguments in previous cases. The PSC denied appellants' motion for rehearing.

III. ANALYSIS

The standard of review for PSC orders is narrow and well defined. MCL 462.25 provides that all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co. v. Pub. Service Comm.*, 389 Mich. 624, 635-636, 209 N.W.2d 210 (1973). A party aggrieved by an order of the PSC has the burden to prove by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow the mandates of a statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint,* 460 Mich. 396, 427, 596 N.W.2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc. v. Pub. Service Comm.*, 377 Mich. 259, 279, 140 N.W.2d 515 (1966).

We must give due deference to the PSC's administrative expertise, and will not substitute our judgment for that of the PSC. *Attorney Gen. v. Pub. Service Comm. No. 2,* 237 Mich.App. 82, 88, 602 N.W.2d 225 (1999). However, we may not abandon our responsibility to interpret statutory language and legislative intent. *Miller Bros. v. Pub. Service Comm.*, 180 Mich App. 227, 232, 446 N.W.2d 640 (1989). Statutory interpretation is a question of law subject to

review de novo. As a general rule, we will defer to the construction placed on a statute by a government agency charged with interpreting it, unless the agency interpretation is not supported by the record or is otherwise unreasonable. *In re Canales Complaint,* 247 Mich.App. 487, 496, 637 N.W.2d 236 (2001). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Michigan,* 254 Mich App. 675, 682, 658 N.W.2d 849 (2003).

1. DECISION ON SNF ISSUES

Appellants argue that the PSC's orders here are unlawful and unreasonable because the PSC's decision on the SNF issues is not supported by competent, material, and substantial evidence on the whole record as required by Const. 1963, art. 6, § 28, and does not make findings of fact and conclusions of law that allow for meaningful appellate review, as required by MCL 24.285. We disagree.

Appellants take the position that the PSC had the authority and the duty to undertake a broad investigation of IMPCo's actions with regard to SNF issues, and, at a minimum, disallow recovery of SNF costs through IMPCo's PSCR clause on the ground that IMPCo had acted unreasonably and imprudently with respect to collection of the costs from ratepayers and payment of the fees to the DOE.[3]

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[3] The PSC conducted the case according to the requirements set forth in MCL 460.6j. Appellants participated fully; the assertion

Appellants say that the PSC should have taken the position that IMPCo's request that it be allowed to recover SNF costs from ratepayers through its PSCR clause was presumptively unreasonable in light of the DOE's failure to commence an SNF disposal program, and should have required IMPCo to overcome that presumption. No authority allows the PSC to make such an assumption. Rather, the PSC must "evaluate the reasonableness and prudence of the decisions underlying" a utility's PSCR plan, and "approve, disapprove, or amend" the PSCR plan in light of that evaluation. MCL 460.6j(6).

IMPCo presented evidence that payment of the SNF fees was mandated by federal law and its standard contract with the DOE, and that failure to make the payments could lead to imposition of interest charges and possible loss of its license to operate its nuclear facility. The PSC was entitled to rely on the evidence presented by IMPCo on this issue, rather than the evidence presented by appellants. *Great Lakes Steel Div. of Nat'l Steel Corp. v. Pub. Service Comm.*, 130 Mich.App. 470, 481, 344 N.W.2d 321 (1983). Moreover, the PSC concluded that, in the absence of evidence that IMPCo acted unreasonably and imprudently with regard to the collection of SNF costs, it had no authority to impose additional remedies such as those suggested by appellants. Appellants point to no statute or caselaw that holds to the contrary.

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that appellants did not receive the notice required by MCL 460.6a(1) is without merit.

The basis for the PSC's decision is set out clearly in its order approving IMPCo's PSCR plan, and in particular in its order denying appellants' petition for rehearing. Appellants' argument that the PSC's decision is unlawful and unreasonable because it does not comply with Const. 1963, art. 6, § 28 and MCL 24.285 is unsubstantiated.

2. PROCEDURAL/DISCOVERY ISSUES

Appellants argue that the PSC's orders here are unlawful and unreasonable because the hearing referee and the PSC engaged in a one-sided review process. The referee denied appellants' motion to compel discovery of actions IMPCo might have taken to better enforce its standard contract with the DOE, and also denied appellants' motion to strike portions of IMPCo's testimony that appellants regard as conclusory. However, the referee granted IMPCo's motion to strike portions of appellants' expert evidence regarding SNF issues. The PSC affirmed these rulings. Appellants assert that this review process denied them due process, adequate judicial review, and notice and an opportunity to be heard. We disagree.

A party may not simply announce its position and then leave it to this Court to discover and rationalize the basis for its claims. *Wilson v. Taylor,* 457 Mich. 232, 243, 557 N.W.2d 100 (1998). Furthermore, a party may not give an issue cursory treatment with little or no citation of supporting authority. *Silver Creek Twp. v. Corso,* 246 Mich.App. 94, 99, 631 N.W.2d 346 (2001). Appellants' argument on this issue contains no specifics regarding what discovery matters they believe were improperly withheld, or what testimony

proffered by their witness was improperly stricken from the record. Appellants do not explain how the PSC would have decided this matter differently had the discovery material and testimony been before it on the record. The lack of specifics in appellants' argument leads us to conclude that this issue has been abandoned. *Yee v. Shiawassee Co. Bd. of Comm'rs,* 251 Mich.App. 379, 406, 651 N.W.2d 756 (2002).

3. EFFECT OF FEDERAL LAW

Appellants observe that IMPCo's basis for arguing that it was entitled to recover the SNF fees paid to the DOE was that payment of the fees is mandated by federal law. Appellants maintain that in *Indiana Michigan Power Co. v. Dep't of Energy,* 319 U.S.App.D.C. 209, 88 F.3d 1272 (1996), the court held that a utility's obligation to pay SNF fees was reciprocal to the DOE commencing SNF disposal by January 31, 1988. *Id.* at 214. *Moreover,* in *Northern States Power Co. v. Dep't of Energy,* 128 F.3d 754, 757 (C.A.D.C., 1997), the court stated that the DOE's obligation to meet the January 1998 deadline was unconditional. Appellants contend that a utility's duty to pay SNF fees is reciprocal to the DOE's duty to commence disposing of SNF in a timely manner and that, because the DOE did not fulfill its duty, a utility such as IMPCo has no duty to continue paying SNF fees to the DOE. Therefore, appellants assert, the PSC had the authority to protect ratepayers by denying IMPCo's request to recover SNF costs through its PSCR clause, or by requiring IMPCo to take other steps to protect ratepayers. We disagree.

Appellants' reliance on *Indiana Michigan Power Co., supra,* for the proposition that the payment of SNF fees is no longer mandatory, is misplaced. In that case, the court addressed the DOE's assertion that the DOE had no clear obligation under the NWPA to accept SNF from utilities absent the existence of an operational disposal facility. The court disagreed and concluded that under 42 U.S.C. 10222(a)(5), the DOE's duty to dispose of SNF was conditioned on the payment of disposal fees by utilities. Nothing in the statute indicated that the duty to dispose of SNF was tied to the commencement of operation of a disposal facility. *Id.* at 212-213. *Indiana Michigan Power Co.* does not hold that a utility's payment of SNF disposal fees is contingent on the DOE's putting into operation a disposal facility no later than January 31, 1998. The payment of SNF fees by a utility is mandated by 42 U.S.C. 10222.

A witness for IMPCo testified that IMPCo's actions with respect to collection of SNF costs from ratepayers and payment of SNF fees to the DOE were reasonable and prudent. The witness noted that (1) payment was required under IMPCo's standard contract with the DOE; (2) IMPCo's decision to pay the fees notwithstanding the federal government's delay in completing a disposal site was consistent with action taken by other utilities; (3) if IMPCo refused to pay the fees it risked losing its license to operate its nuclear power plant; and (4) IMPCo had supported litigation to compel the federal government to fulfill its duties under the NWPA.

The PSC has the discretion to consider a variety of factors when setting just and reasonable rates,[4] and the authority granted to the PSC is set out in MCL 460.6a and MCL 460.6j. The PSC acted in accordance with this authority and properly concluded that, in the absence of a finding of unreasonable or imprudent conduct on the part of a utility, it lacked the authority to impose the remedies suggested by appellants, including placing the burden of paying SNF fees on IMPCo's stockholders rather than on IMPCo's ratepayers. Appellants have not shown by clear and satisfactory evidence that the PSC's decision is unlawful or unreasonable. MCL 462.26(8).[5]

4. SCOPE OF JURISDICTION

In a PSCR proceeding, the PSC acts under the scope of authority granted to it in MCL 460.6j. Pursuant to that statute, the PSC was required to evaluate the reasonableness and prudence of IMPCo's

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[4] See *Detroit v. Public Service Comm.*, 308 Mich. 706, 718, 14 N.W.2d 784 (1944).

[5] Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption. Moreover, a state utility commission must allow, as a reasonable operating expense, a cost incurred pursuant to a federal statute, see *ABATE v. Pub. Service Comm.*, 192 Mich.App. 19, 22-27, 480 N.W.2d 585 (1991) (holding that states must give effect to rates approved by the Federal Energy Regulatory Commission), and SNF fees paid by IMPCo are mandated by statute, 42 U.S.C. 10222(a).

PSCR plan, and to approve, disapprove, or modify the plan on the basis of its conclusions.

Appellants argue that the PSC erred in concluding that consideration of their recommendations and proposed remedies was beyond the scope of its jurisdiction in a PSCR clause case. In a PSCR, the PSC has the statutory authority to conduct a full evidentiary hearing and to consider all relevant factors when determining what costs are recoverable. MCL 460.6j(6). Appellants maintain that the PSC had the authority to disallow recovery of SNF costs through IMPCo's PSCR clause. Alternatively, appellants assert that the PSC had the authority to impose lesser remedies, such as requiring IMPCo to submit detailed reports and data regarding SNF; place SNF disposal fees collected from ratepayers into an escrow account to ensure that the funds would be available for alternative SNF disposal programs in the event that the DOE does not commence its own disposal program; and file a performance bond or to secure an insurance policy to ensure proper performance of SNF disposal. We disagree.

IMPCo sought to recover costs related to SNF disposal and payment of SNF fees in its PSCR clause. The PSC did not find that IMPCo acted unreasonably or imprudently with respect to SNF disposal issues and payment of SNF fees to the DOE. Appellants cite no statute or caselaw that holds that in a PSCR proceeding in which no finding that a utility engaged in unreasonable or imprudent conduct has been made, the PSC is authorized to go beyond approving the PSCR application to adopt remedies such as those suggested by appellants. The PSC correctly concluded

that if it determines that a utility's actions are reasonable and lawful, it has no authority to adopt extraordinary remedies such as those proposed by appellants. See *Attorney General, supra* at 88.

5. APPELLATE PRECEDENT

Appellants argue that this Court's decision in *Michigan Environmental Council v. Pub. Service Comm*[6] does not serve as precedent to support affirmance of the PSC's decision for several reasons. First, the PSC proceeding reviewed in that case concerned two Wisconsin utilities that served small portions of the Upper Peninsula of Michigan and did not store SNF in Michigan, whereas in this case, IMPCo serves many Michigan customers and stores SNF in an on-site facility in Michigan. Second, the appellants did not seek outright disallowance of recovery of the SNF costs, as they did here. Third, in the opinion in that case, this Court acknowledged that issues raised by the appellants were appropriate for consideration, albeit not in a PSCR proceeding. Fourth, the PSC noted that SNF disposal issues are significant. Finally, because the opinion is unpublished, the PSC's reliance on it is erroneous. We disagree.

This Court's decision in *Michigan Environmental Council, supra,* is unpublished, and therefore does not constitute binding precedent. MCR 7.215(C)(1).

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[6] Unpublished opinion per curiam of the Court of Appeals, issued December 9, 2003, 2003 WL 22902853 (Docket Nos. 240403, 240406).

Nevertheless, we consider its analysis to be persuasive. See, e.g., *Watson v. Bureau of State Lottery,* 224 Mich.App. 639, 648, 569 N.W.2d 878 (1997). Here, the PSC was entitled to note that its rejection of appellants' issues had been upheld in other proceedings. The arguments raised by appellants in *Michigan Environmental Council* were substantially similar to those raised here.

IV. CONCLUSION

For the reasons set forth in this opinion, we affirm the PSC's orders approving IMPCo's PSCR application and denying appellants' petition for rehearing.

APPENDIX B

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13919

[Filed August 1, 2005]

In the matter of the application of	)
INDIANA MICHIGAN POWER	)
COMPANY for approval of a power	)
supply cost recovery plan and for	)
authorization to charge monthly	)
power supply cost recovery factors	)
for calendar year 2004.	)
	)

At the August 1, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

ORDER

1. *Procedural History*

On May 31, 2005, the Michigan Environmental Council and the Public Interest Research Group in

Michigan (MEC/PIRGIM) filed a petition for reopening and rehearing of the Commission's April 28, 2005 order in this matter, in which the Commission approved Indiana Michigan Power Company's (I&M) 2004 power supply cost recovery (PSCR) plan and factors. MEC/PIRGIM contend that, pursuant to Rules 401 and 403, R460.17401 and R460.17403, the decision of the Commission must be reopened and reheard because there has been a change in the facts or law that requires development of a full and complete record, and/or because of newly discovered evidence or a claim of error.

Responses in opposition to MEC/PIRGIM's petition for reopening and rehearing were filed on June 21, 2005, by I&M and the Commission Staff (Staff).

2. *Positions of the Parties*

In its April 28, 2005 order, the Commission rejected several arguments made by MEC/PIRGIM concerning spent nuclear fuel (SNF). The Commission concluded that I&M had not acted unreasonably or imprudently in its handling of SNF payments, and found that I&M should not unilaterally cease making payment of its SNF fees to the Department of Energy's (DOE) Nuclear Waste Fund, despite the federal government's ongoing default on its obligation to build and operate a geologic repository for SNF. The Commission found that an interruption of payments could risk several adverse consequences, including non-renewal of I&M's nuclear power plant license, suspension of the standard contract between I&M and the DOE, and I&M's lack of access to any federal repository for SNF that may eventually be operational. *See,* April 28, 2005

order in Case No. U-13919, pp. 10-11. The Commission found that PSCR customers are responsible for the payment of SNF fees, because the fees cover disposal costs pursuant to MCL 460.6j(1)(a). *Id.* The Commission further found that the contested PSCR case is not the proper forum in which to interject broad-based SNF issues. *Id.* at pp. 12-13.

MEC/PIRGIM contend that the Commission's April 28, 2005 order should be reopened and reheard because the Commission erred in several respects on these issues. MEC/PIRGIM argue that the Commission's finding that I&M has been reasonable and prudent in its handling of SNF fees is incorrect, because I&M provided no information in its 2004 plan as to the steps that I&M intends to take to enforce its standard contract, to request a reduction in fees from the DOE, or to gain permission to use an escrow trust for the fees. MEC/PIRGIM themselves point out that they have made these same arguments before, in their initial brief and their exceptions.

MEC/PIRGIM argue that the Commission misconstrued their position, in that they state that they never asserted that I&M should cease making payments, but rather that I&M's shareholders should make the payments, rather than I&M's ratepayers. MEC/PIRGIM argue that the Commission has failed to determine that ratepayers are not paying for unnecessary expenses, or that ratepayers are paying the minimum possible amount for SNF fees. MEC/PIRGIM argue that, because SNF fees are subject to 1982 PA 304 (Act 304), it must follow that the review of such fees should take place in a PSCR proceeding. MEC/PIRGIM assert that the

Commission's actions are arbitrary and capricious, contrary to Act 304, in violation of the hearing requirements of the Administrative Procedures Act, and in violation of due process and equal protection principles.

The Staff argues that MEC/PIRGIM's petition fails to meet the requirements of Rules 401 and 403, because it does not set forth any newly discovered evidence, nor show any need for receiving further evidence, nor does it contain any new arguments.

I&M argues that MEC/PIRGIM make no real effort to satisfy the requirements of Rules 401 or 403, and simply reargue the presentations previously made in this case. I&M argues that MEC/PIRGIM fail to show that a reopening is necessary for the development of a full and complete record or that there has been a change in conditions of fact or law such that the public interest requires reopening. I&M argues that MEC/PIRGIM merely disagree with the Commission's findings. I&M argues that the record in the case shows that continued payment of SNF fees is reasonable and prudent, and that MEC/PIRGIM ignore the fact that the Commission reviewed the reasonableness and prudence of these costs as it is obligated to do pursuant to MCL 460.6j(6). I&M points out that, having found the costs to be reasonable and prudent, there is no legal basis for shifting these costs to shareholders.

I&M also points out that it is legally obligated to pay the SNF fees, in order to retain its nuclear power plant license and its ability to access the planned federal repository. I&M further points out that

escrowing of the funds is disallowed under the standard contract, and that one federal court has ruled that utilities may not escrow the funds, but must seek relief under the standard contract. I&M also points out that it pays the minimal amount of fees required under the standard contract.

3. *Discussion*

Rule 401 allows for the record of a proceeding to be reopened for the purpose of receiving further evidence when a reopening is necessary for the development of a full and complete record, or there has been a change in conditions of fact or law such that the public interest requires the reopening. R460.17401. The Commission may reopen a proceeding on the application of a party filed prior to the expiration of the statutory time period for rehearing. *Id.* Rule 403 provides that a petition for rehearing may be filed with the Commission within 30 days after service of the decision being petitioned, and may be based on a claim of error in fact or law, or on a claim of newly discovered evidence arising subsequent to the close of the record, or on unintended consequences resulting from compliance with the order.

The Commission has stated on numerous occasions that an application for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. *See,* October 14, 2004 order in Case No. U-13716, p. 2. An application for reopening requires a showing of a change in fact or law, such that the record in the case can no longer be considered full or complete.

MEC/PIRGIM make no effort whatsoever to present new evidence or even a new argument. MEC/PIRGIM cite no change in fact or law. Every substantive argument made by MEC/PIRGIM in their petition was made in their initial brief, and many of them were repeated thereafter in their reply brief, exceptions and replies to exceptions. MEC/PIRGIM make no convincing claim of error. The Commission finds that MEC/PIRGIM's petition demonstrates no grounds for reopening or rehearing and denies the petition.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 *et seq.*; 1919 PA 419, as amended, MCL 460.51 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; 1982 PA 304, as amended, MCL 460.6h *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The petition for reopening/rehearing filed by MEC/PIRGIM should be denied.

THEREFORE, IT IS ORDERED that the petition of the Michigan Environmental Council and the Public Interest Research Group in Michigan for reopening and/or rehearing is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

SEAL

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of August 1, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of August 1, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

APPENDIX C

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13919

[Filed April 28, 2005]

In the matter of the application of	)
INDIANA MICHIGAN POWER	)
COMPANY for approval of a power	)
supply cost recovery plan and for	)
authorization to charge monthly	)
power supply cost recovery factors	)
for calendar year 2004.	)
	)

At the April 28, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On September 30, 2003, Indiana Michigan Power Company (I&M) filed an application, with supporting testimony and exhibits, seeking approval of its power supply cost recovery (PSCR) plan and factors for the 12-month period ended December 31, 2004, pursuant to 1982 PA 304 (Act 304), as amended, MCL 460.6h *et seq*.

I&M requested approval of PSCR factors of a negative 0.10 mills per kilowatt-hour (kWh) for its St. Joseph service area and a negative 1.35 mills per kWh for its Three Rivers service area.

Pursuant to due notice, a prehearing conference was held on November 25, 2003 before Administrative Law Judge Mark E. Cummins (ALJ). I&M, the Michigan Environmental Council and Public Interest Research Group in Michigan (MEC/PIRGIM), and the Commission Staff (Staff) participated in the proceedings.

The ALJ conducted an evidentiary hearing on March 10, 2004. During the hearing, I&M offered testimony and exhibits from five witnesses and MEC/PIRGIM offered testimony and exhibits from one witness.

The parties filed briefs on April 9, 2004. I&M and MEC/PIRGIM filed reply briefs on April 27, 2004.

The ALJ issued a Proposal for Decision (PFD) on June 4, 2004. All parties filed exceptions on June 18, 2004. I&M and MEC/PIRGIM filed replies to exceptions on June 28, 2004.

II.

EMISSION ALLOWANCES ISSUES

A system of emission allowances, which was developed in hopes of improving air quality, permits every power plant to emit pollution up to a designated level. Power plants are allotted a base number of "allowances." These allowances serve as a "ceiling" on the amount of pollutants that a plant can emit. If a plant exceeds its ceiling level of allowances, it can purchase additional allowances from others who have no need to utilize their full allotment of allowances. The purchased allowances effectively enable a power plant to pollute at levels above its ceiling.

In its 2004 PSCR plan, I&M's proposed St. Joseph rate area PSCR factor calculation included revenues of $12,678,000 from inter-company sales of sulfur dioxide (SO_2) emission allowances and costs of $4,345,000 associated with purchases of SO_2 emission allowances, resulting in a net credit to PSCR costs of $8,333,000. I&M also proposed increasing its 2004 PSCR costs by $1,014,000 for oxides of nitrogen (NO_X) emission allowance consumption.

The PFD called for the removal of the financial effects of both the SO_2 and the NO_X emission allowance

costs from I&M's PSCR factors.[1] The ALJ excluded the financial effect of SO_2 emission allowance costs and credits from PSCR costs because of a long-standing Commission policy to exclude the financial effects of SO_2 emission allowances from PSCR costs. In the PFD, the ALJ observed that "[t]he Commission has on numerous occasions, excluded from the computation of PSCR factors certain expenses related to emission allowance purchases, consumption, and trading." PFD, p. 18. The ALJ went on to state that the financial effects of emission allowances should be excluded from PSCR plan case costs because Act 304 allows recovery of costs that result from "fuel burned by the utility for electric generation." The PFD concluded that emission allowances are not costs that result from "fuel burned by the utility for electric generation," so it is appropriate to remove the financial effects of SO_2 emission allowances from PSCR plan case costs. The PFD was concerned that allowing the financial effects of emission allowances in the computation of the PSCR factor would open a Pandora's box that could include

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[1] The ALJ was uncertain whether the financial effects of SO_2 and NO_x emission allowances were included in the development of the PSCR costs for I&M's Three Rivers' rate area. I&M explains that the PSCR costs for its Three Rivers area are calculated differently from power supply costs for the St. Joseph area. The company states that PSCR costs for the Three Rivers area are computed under the Federal Energy Regulatory Commission (FERC) Net Energy Cost method, which excludes the financial effects of SO_2 and NO_x allowances from the calculation of the PSCR factor. Because emission allowance costs are excluded from PSCR costs for the Three Rivers rate area, the Commission need only consider the financial effects of emission allowances on the PSCR factor for the St. Joseph rate area.

recovery of many other types of costs through the PSCR factor. The PFD also concluded that NO_x allowances should be excluded in the same manner and for the same reasons as SO_2 allowances.

I&M and the Staff filed exceptions concerning the ALJ's recommendation to remove the financial effects of emission allowance costs from determination of I&M's PSCR factors.

I&M explains that the financial effects of its SO_2 emission allowances are different from other Michigan utilities because I&M's allowances result from an American Electric Power[2] (AEP) pooling arrangement that was developed under an Interim Allowance Agreement (IAA).[3] I&M states that the PFD did not appropriately consider the fact that the company's SO_2 emission allowance costs and credits were based on the IAA. According to I&M, the financial effect of emission allowances is similar to other AEP system pool related items that are includible in the PSCR, such as charges for energy received from the pool, credits for energy delivered to the pool, an allocated share of the costs and revenues associated with system sales, and capacity settlement credits. I&M points out that the IAA has been recognized by the Commission in prior cases. I&M contends that the financial effects of the IAA were adopted by the Commission in the December

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[2] I&M is a subsidiary of AEP.

[3] The IAA, which allocates the costs and benefits of SO_2 compliance among AEP companies, establishes a methodology and transfer price for the allocation of emission allowances among the major operating companies of the Eastern AEP system.

16, 1994 order in Case No. U-10708 and have been reflected in all of I&M's subsequent PSCR plans. Further, I&M states that its monthly 45-day reports filed with the Commission, and its PSCR factor calculation, have included emissions allowance settlement costs since the IAA was accepted by the Commission.

I&M also states that the FERC allows treatment of emission allowance costs in wholesale sales transactions. Further, I&M maintains that, to the extent that its PSCR factor reflects the effect of off-system sales, those sales already reflect partial recovery of the financial effects of emission allowances. The company concludes that it would be inconsistent to recognize the financial effects of emission allowances reflected in off-system sales as a credit, but deny the benefit of the financial effects of emission allowances from the remaining portion of the pooled power supply costs.

Citing the May 10, 1994 order in Case No. U-10335, which was a rate case proceeding for Consumers Energy Company (Consumers), I&M argues that the Commission decided that Consumers' PSCR clause should be amended to allow emission fees to be treated as booked cost of fuel:

> The Commission finds that the ALJ properly analyzed this issue in concluding that the emission fees may be treated as a booked cost of fuel. Were it not for the burning of fuel, there would be no emissions permit fees. As a result, there is a direct relationship between the

> emission fees and the fuel burned for generation.

Order, Case No. U-10335, p. 67.

Further, I&M notes that the Commission reaffirmed this finding in the August 18, 1994 order in Case No. U-10445, which involved Consumers' 1994 PSCR plan. In that order, the Commission found that it would be appropriate to evaluate the reasonableness of emissions permit fees in annual PSCR filings.

I&M asserts that the financial effects of emission allowances constitute an element of power supply costs pursuant to its PSCR clause. I&M contends that it is appropriate to include such costs in its PSCR factor because they vary with production/generation, and the coal burned, and are a necessary ingredient of the coal used. I&M also states that in the AEP system, the cost of the emissions are inextricably linked with the price of coal. As more coal is burned and more emissions are produced, more allowances are required.

The Staff also takes exception to the PFD's recommendation to remove the financial effects of SO_2 emission allowances from calculation of the PSCR factor. According to the Staff, the net effect of including both the expenses and credits associated with SO_2 emission allowances reduces I&M's 2004 PSCR expenses by $8,333,000 for the St. Joseph rate area. The Staff urges the Commission to reject the recommendation in the PFD so that I&M's St. Joseph rate area customers may receive the benefit of the $8,333,000 cost reduction.

Finally, although MEC/PIRGIM did not file an exception that specifically addresses this issue, in its reply to exceptions MEC/PIRGIM supported the positions taken by I&M and the Staff.

The Commission finds that the exceptions filed by I&M and the Staff with regard to SO_2 emission allowances are well taken. By including both the costs and the credits associated with the emission allowances in its 2004 PSCR plan, the ratepayers in I&M's St. Joseph rate area are benefited by a $8,333,000 PSCR cost reduction. The May 10, 1994 order in Case No. U-10335 and the August 18, 1994 order in Case No. U-10445 support I&M's position that emissions allowances qualify for inclusion as PSCR expenses. Moreover, commencing in 1995, I&M's PSCR cases have included such costs in the calculation of the PSCR factors for its St. Joseph rate area. Given these circumstances, the Commission is persuaded that I&M's and the Staff's exceptions should be granted.

I&M also requests that the Commission reject the PFD's exclusion of NO_x emission allowance costs from PSCR costs. I&M states that NO_x allowances are properly includible in the calculation of the PSCR factor. I&M also states several recent Commission decisions support its position. The Staff and MEC/PIRGIM agree with the result urged by I&M on this issue.

In the January 21, 2003 order in Case No. U-12725, the Commission found that Wisconsin Electric Power Company should be authorized to implement a request for deferred accounting, escrow, and reconciliation treatment of the utility's NO_x costs. Order, Case No.

U-12725, p. 4. Additionally, in the November 23, 2004 order in Case No. U-13808, the Commission approved recovery by The Detroit Edison Company of NO_x allowances expenses as a PSCR cost. Order, Case No. U-13808, p. 112. Based on the positions adopted on NO_x costs in Cases Nos. U-12725 and U-13808, the Commission finds that it is consistent for I&M to include NO_x emission allowances costs in the calculation of its PSCR factor in this case.[4]

III.

LINE LOSS FACTOR ISSUE

MEC/PIRGIM claimed that the I&M's PSCR costs were overstated by $126,000 to $144,000 for Michigan jurisdictional customers because of errors caused by including company use and line losses in the calculation of the spent nuclear fuel (SNF) fees. MEC/PIRGIM contended that I&M's calculation of SNF fees may be overstated by 12 to 14 percent as a result of failing to subtract company use and line losses from nuclear energy generated, and then erroneously increasing SNF fees by the line loss factor. MEC/PIRGIM insisted that the SNF fee was owed on net electric energy generated, as opposed to gross electric energy generated. Because MEC/PIRGIM was uncertain whether I&M had used gross or net generation to calculate the SNF fee payable to the U.S.

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[4] The rulings with regard to the SO_2 and NO_x emission allowance issues render moot MEC/PIRGIM's Exception III, which alleged that the result recommended in the PFD formed the basis for a "notice and hearing" violation.

Department of Energy (DOE), MEC/PIRGIM asked the Commission to clarify that the SNF fee should be calculated based on generation after company use and line losses from the busbar to the customer are subtracted out.

I&M maintained that the SNF fees paid to the DOE were correctly computed based on net generation. I&M asserted that MEC/PIRGIM confused the calculation of the SNF fee cost with the calculation of the PSCR factor for purposes of collecting that cost. Although MEC/PIRGIM alleged that fees should be paid in accordance with the amount of nuclear energy generated and sold, AEP apparently calculated its fees based upon net energy at the source, not net energy generated and sold. I&M argued that the use of line losses with respect to the calculation of a PSCR factor does not change the actual calculation of the SNF fee cost to be paid by AEP to the DOE during 2004.

The ALJ agreed with the utility. The ALJ found that confirmation that the SNF fee was based on 1 mill per kWh of electricity "generated and sold" is shown by the fact that total projected post-1983 SNF disposal fee costs are slightly less than 1 mill per kWh of projected net nuclear generation.

The Commission finds that I&M's calculation of SNF fees takes into account losses from the plant to the customer because the fees were calculated based on net generation times an SNF fee factor that was reduced for losses. To derive net generation, gross generation is reduced by company use and internal losses. Evidence of the fee being computed based on net generation is shown for January 2004 on Exhibit

A-3, page 1, line 1, which for the month of January, shows net generation of 716.8 gigawatt-hours (GWh). Net generation of 716.8 GWh is multiplied by a factor of .9350 (1.000 – 0.065 = .9350), to take into account losses from the busbar of the generating plant to the customer. For the month of January 2004, line 9 of Exhibit A-3, page 1, shows that I&M's multiplication of net generation of 716.8 GWh by 0.9350 mills/kWh correctly yields its SNF fee of $670,235 for that month.

IV.

OTHER SPENT NUCLEAR FUEL ISSUES

AEP entered into a "Standard Contract" with the DOE for disposal of SNF. The contract requires SNF storage fee payments to the DOE of 1 mill for each kWh of electricity generated and sold by a nuclear-fueled generating facility. As consideration for the payment received, the DOE was to provide a site for SNF storage by January 31, 1998. The DOE defaulted on its obligation under the contract when it did not provide a place for SNF storage by January 31, 1998. In spite of the DOE's default, I&M continues its payment of SNF fees. I&M included SNF fees of $2,312,250 in its 2004 PSCR costs.

Based on the testimony of Ronald C. Callen, a consulting witness with expertise regarding nuclear energy and SNF disposal issues, MEC/PIRGIM argue that it was unreasonable and imprudent for I&M to continue paying SNF fees to the DOE. Mr. Callen stated that I&M's 2004 PSCR plan and five-year forecast were incomplete because they failed to provide an explanation to justify the recovery of SNF fees,

related SNF storage, and other such costs that were included in its filing. According to Mr. Callen, I&M's attempt to collect its payments of the SNF fees should be disallowed because I&M failed to demonstrate it has been reasonable and prudent in incurring, mitigating, or minimizing SNF costs. Mr. Callen also stated that I&M's inactions have placed the risks associated with SNF storage and disposal issues entirely on its ratepayers.

Mr. Callen believed that I&M could simply stop paying all SNF fees because the SNF fee payments are a "reciprocal obligation" that is linked to the commencement of SNF disposal by the DOE. Because the DOE has defaulted on its obligation to take possession of SNF, MEC/PIRGIM argues that I&M's duty to pay the fee has ceased. In support for its position, MEC/PIRGIM cites federal court rulings holding that if one party defaults under a reciprocal agreement, the other party is not bound.

Mr. Callen also testified that I&M's ratepayers are not primarily responsible for the costs associated with the disposal of SNF. He stated that the Nuclear Waste Policy Act of 1982 (NWPA) placed the burden of paying for SNF costs on the "generators and owners of SNF". Accordingly, MEC/PIRGIM claims that because the NWPA says nothing about utility customers being responsible for paying SNF fees, I&M's ratepayers are not automatically required to reimburse utilities for incurred SNF costs.

Mr. Callen next testified that all SNF fees should be excluded from I&M's 2004 PSCR plan because I&M was lax in pursuing court action to protect the

interests of its ratepayers. MEC/PIRGIM argues that I&M's laxness in pursuing judicial remedies is an example of I&M's unreasonableness and imprudence.

Finally, MEC/PIRGIM criticize I&M's failures to pursue other SNF disposal sites, provide sufficient information about SNF fee costs, and take protective measures to guard ratepayer interests in SNF fees paid.

Citing 10 CFR 961.11 and Article 8 of the Standard Contract, I&M maintains that it is reasonable and prudent to continue paying SNF fees to the DOE because interest charges will accrue on unpaid SNF fees. Additionally, I&M states that even if the DOE were to suspend the Standard Contract as a result of its non-payment, the company's obligation to continue paying SNF fees would not be suspended. I&M also states that failure to make payments could permit the DOE to unilaterally suspend its obligation to take SNF from the company when a repository is developed or could lead to non-renewal of its nuclear power plant license by the Nuclear Regulatory Commission (NRC). I&M says the NRC's "viability assessment" dictates that if a utility does not have a place to put SNF, it will not have a license to operate a facility that brings electricity to the community. Under the NRC's "viability assessment," the DOE is the only acceptable source for storage of spent nuclear fuel.

The Commission concludes that I&M has not acted unreasonably or imprudently in its handling of SNF payments. In so doing, the Commission rejects all of MEC/PIRGIM's arguments to the contrary. Nothing in this record persuades the Commission that I&M

should unilaterally cease its payment of SNF fees to the DOE at this time. To do so might risk consequences, such as the imposition of interest payments levied on unpaid SNF amounts due or suspension of the standard contract, which might mean that I&M may not be able to store SNF at the DOE's repository if it is ever built. A failure to have access to a repository that stores SNF could result in a finding by the NRC that I&M's nuclear plant is not "viable", and could result in the NRC's nonrenewal of I&M's nuclear power plant license. Obviously, if the NRC does not renew I&M's nuclear power plant license, the utility's ability to provide electricity to its customers would be affected. These types of actions must be more fully examined, preferably in a generic proceeding, to access the risk to the utility, its ratepayers, and the general public.

The Commission also disagrees with MEC/PIRGIM's contention that PSCR customers are not responsible for payment of SNF fees. Act 304 governs the recovery of power supply costs from utility customers. Section 6j(1)(a) of Act 304 allows a utility with a PSCR clause to recover from its customers "booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a). SNF fees are expenses that result from disposal of nuclear fuel rods that have been used to generate electricity. Because PSCR costs include disposal costs, and because there has been no showing of unreasonableness and imprudence in I&M's

incurrence of SNF fees, the Commission finds that SNF fees are recoverable from its PSCR customers.

Further, the Commission finds that, contrary to MEC/PIRGIM's assertions, the record shows adequate court actions by I&M to address the DOE's default on its obligation to take possession of SNF. I&M established through federal court litigation that DOE has an unconditional obligation to dispose of SNF. *See, Indiana Michigan Power Co v Dept of Energy*, 88 F3d 1272 (1996). After the 1996 court ruling, the DOE informed the parties that it would not accept SNF by January 31, 1998. After being informed of the DOE's refusal to accept SNF, another affected utility sought a writ of mandamus. The Court of Appeals denied in part the writ, and held that the standard contract provided damages as a remedy for the DOE's default. *See, Northern States Power v Dept of Energy*, 128 F3d 754 (1997). I&M says that in *Northern States Power*, equitable remedies were denied because the Court found that contract damages were an available remedy for the DOE's default on its obligation under the Standard Contract. I&M also says that in *Northern States Power II v Dept of Energy*, 224 F3d 1361 (2000) and *Maine Yankee Atomic Power v United States*, 225 F3d 1336 (2000), the United States Court of Appeals confirmed that seeking contract damages should be the utility's first response to the DOE's default on its obligation to take possession of SNF. Because the court actions taken by I&M and other utilities are deemed adequate, no finding of unreasonableness and imprudence can be found based on a failure to seek judicial relief.

As for the remainder of MEC/PIRGIM's arguments, the Commission notes that they have repeatedly been considered and rejected by this Commission in the context of PSCR proceedings. Recently, the Commission stated:

> The Commission remains convinced that the efforts of the MEC/PIRGIM to interject broad based SNF issues into various types of individual contested cases is misplaced. In its November 20, 2001 orders in Cases Nos. U-12613 and U-12615, the Commission rejected similar efforts by MEC/PIRGIM to interject SNF issues into PSCR proceedings. In so doing, the Commission recognized that the SNF disposal issues confronting the electric utility industry are significant and that a solution will not be implemented any time soon. However, the Commission found that the MEC/PIRGIM's proposals did not have much bearing on the reasonableness or prudence of a utility's management. The Commission expressed its belief that (1) the problem was much larger than any individual utility's nuclear operation, (2) feasible alternatives to the construction of a permanent repository are not readily apparent, and (3) the Commission is unable to find that individual utilities are acting imprudently. Moreover, the Commission was persuaded that the MEC/PIRGIM's remedial proposals are beyond the scope of PSCR proceedings. The Court of Appeals has upheld the Commission on this issue. See, *Michigan Environmental Council v Public Service Comm,* unpublished opinion per curiam of the Court of Appeals,

decided December 9, 2003, Docket No. 240406. Therefore, the Commission finds that the ALJ acted appropriately in striking the testimony of Mr. Callen and in rejecting the MEC/PIRGIM's arguments on this issue.

February 28, 2005 order, Case No. U-13917, p. 11.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 *et seq.*; 1919 PA 419, as amended, MCL 460.51 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. I&M's 2004 PSCR plan should be approved.

THEREFORE, IT IS ORDERED that:

A. Indiana and Michigan Power Company's 2004 power supply recovery plan is approved.

B. The authorized 2004 power supply cost recovery factor for Indiana Michigan Power Company's St. Joseph rate area is a negative 0.10 mills per kilowatt-hour, relative to a power supply cost recovery base of 3.33 mills per kilowatt-hour recovered through the base rates approved in the order in Case No. U-9656 dated February 12, 1996.

C. The authorized 2004 power supply cost recovery factor for Indiana Michigan Power Company's Three

Rivers rate area is a negative 1.35 mills per kilowatt-hour, relative to a power supply cost recovery base of 9.72 mills per kilowatt-hour recovered through the base rates approved in the order in Case No. U-9205 dated March 9, 1989.

D. Within 30 days of the date of this order, Indiana Michigan Power Company shall file tariff sheets reflecting the power supply cost recovery base and factors approved by this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(SEAL)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of April 28, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of April 28, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

APPENDIX D

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13919

[Filed June 4, 2004]

In the matter of the application of	)
INDIANA MICHIGAN POWER	)
COMPANY for approval of a power	)
supply cost recovery plan and factors	)
for calendar year 2004.	)
	)

PROPOSAL FOR DECISION

I.

HISTORY OF PROCEEDINGS

On September 30, 2003, Indiana Michigan Power Company (I&M), an operating subsidiary in the American Electric Power (AEP) system, filed an application, together with supporting testimony and exhibits, seeking approval of its power supply cost recovery (PSCR) plan and factors for the 12-month period ending December 2004. According to the application, I&M seeks to implement PSCR factors of negative 0.10 mills per kilowatt-hour (kWh) in its St.

Joseph rate area and negative 1.35 mills per kWh in its Three Rivers rate area. These proposed factors represent reductions of 2.53 mills per kWh and 0.63 mills per kWh, respectively, from the PSCR factors approved for the St. Joseph and Three Rivers rate areas in I&M's last plan case.

Pursuant to due notice, a prehearing conference was held on November 25, 2003 before Administrative Law Judge Mark E. Cummins (ALJ). I&M, the Michigan Environmental Council and the Public Interest Research Group in Michigan (collectively, the MEC), and the Commission Staff (Staff) participated in the proceedings. In the course of the prehearing conference, the ALJ granted the MEC's petition to intervene and established a schedule for the remainder of the case.

An evidentiary hearing was conducted on March 10, 2004, during which I&M offered testimony from five witnesses and the MEC presented testimony from one witness. The resultant record consists of 252 pages of transcript and 32 exhibits, 30 of which were received into evidence. Pursuant to the previously-established schedule, each of the parties filed briefs on April 8, 2004. I&M and the MEC filed reply briefs on April 27, 2004.

II.

STATUTORY REQUIREMENTS

Subsection 6j(3) of 1982 PA 304, as amended, MCL 460.6h et seq., (Act 304) requires a utility with a PSCR clause to annually file a complete PSCR plan

describing the expected sources of electric power supply and the changes in the cost of power supply anticipated over a future 12-month period. Based on this information, the utility is to request specific PSCR factors for each of the 12 months in its PSCR plan. The PSCR plan must also describe all major contracts and power supply arrangements for the 12-month period.

Subsection 6j(4) of Act 304 requires the utility to file--contemporaneously with the submission of its PSCR plan--a five-year forecast of its power supply requirements, its anticipated sources of supply, and its projections of power supply costs, all in light of its existing sources of electrical generation and sources of electric generation under construction.

Subsection 6j(5) of Act 304 provides that, after a utility files its PSCR plan and five-year forecast, the Commission is to conduct a proceeding to review the reasonableness and prudence of the PSCR plan and to establish PSCR factors for the period covered by the plan. It further provides that this review shall be conducted as a contested case proceeding pursuant to Chapter 4 of the Administrative Procedures Act of 1969, 1969 PA 306, as amended, MCL 24.201 et seq.

Subsection 6j(6) of Act 304 provides that, in its final order in a PSCR plan case, the Commission shall evaluate the reasonableness and prudence of the decisions underlying the utility's plan and shall approve, disapprove, or amend the plan accordingly. In evaluating the decisions underlying the utility's plan, this subsection continues, the Commission shall consider the cost and availability of the electrical generation open to use by the utility; the cost of

available short-term firm purchases; the availability of interruptible service; the ability of the utility to reduce or eliminate any firm sales to out-of-state customers (if the utility is not a multi-state utility whose firm sales are subject to other regulatory authority); whether the utility has taken all appropriate steps to minimize the cost of fuel; and other relevant factors. This subsection also provides that the Commission must, in its final order regarding the plan, specifically approve, reject, or amend the 12 monthly PSCR factors requested by the utility. Moreover, it demands that those factors shall not reflect any items that the Commission could reasonably anticipate would be disallowed under Subsection 6j(13)--which sets forth the criteria to be considered in a subsequent PSCR reconciliation concerning the 12-month period covered by the plan in question.

III.

TESTIMONY AND POSITIONS OF THE PARTIES

I&M presented direct--and, in some cases, rebuttal --testimony from five witnesses in support of its 2004 PSCR plan. I&M asserts that this testimony, along with its related exhibits, demonstrates that the decisions underlying its PSCR plan are reasonable and prudent. Thus, I&M contends, the Commission should approve its plan and authorize the utility's implementation of the PSCR factors set forth in its application.

I&M's first witness was Stephen D. Baker, the Manager of AEP Service Corporation's[1] Fuel Cost Recovery Administration. Mr. Baker provided a summary of I&M's long-term coal supply agreements, a short-term forecast of the utility's coal deliveries (complete with delivered prices for each of I&M's coal-fired generating units) for 2004, and a five-year forecast of the utility's total coal costs. According to Mr. Baker, the proposed coal purchases are intended to assure that "a continuous supply of coal of the appropriate quality . . . [is] delivered at the lowest cost over a period of years so as to promote the generation of the lowest cost per kWh of electricity, within the constraints of safety, reliability of supply, and environmental requirements." Tr. 71-72.

I&M's second witness was Douglas H. Malin, the Manager of its Nuclear Fuel Section. The primary purpose of Mr. Malin's testimony was to (1) describe the long-term, mid-term, and short-term contracts for the supply and disposal of nuclear fuel used at I&M's Cook Nuclear Plant, (2) discuss the reasonableness and prudence of all actions taken to minimize the utility's costs relating to nuclear fuel, and (3) support the nuclear fuel cycle costs used to compute I&M's total projected PSCR costs. In addition, his direct

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[1] AEP Service Corporation, acting as the agent for all utility operating companies in the AEP system, is responsible for procuring and delivering coal to each of I&M's coal-fired generating units, establishing coal inventory target levels for those units, and monitoring actual inventories throughout the year. It also provides load forecasts for each of the operating companies and develops electric generation forecasts for all generating units within the AEP system.

testimony specifically addressed the effects of the Energy Policy Act of 1992--which imposes an assessment on the utility for decontamination and decommissioning activities based on prior use of the Department of Energy's (DOE's) enrichment facilities--and set forth the steps taken to minimize I&M's 2004 nuclear fuel costs (such as eliminating its nuclear fuel inventory due to the ease of purchasing this fuel on the spot market). Moreover, Mr. Malin offered rebuttal testimony in response to claims that I&M should not have included--as part of its PSCR 2004 costs--any payments to the DOE for spent nuclear fuel (SNF) disposal, and that the utility erred in calculating its post-April 1983 SNF disposal costs.

The third witness offered by the utility was Scott C. Weaver, the Managing Director of Resource Planning and Operational Analysis for AEP Service Corporation. Mr. Weaver testified regarding how the monthly PSCR costs were computed for 2004, as well as how the annual cost figures were established for use in I&M's five-year forecast, for the St. Joseph and Three Rivers rate areas. As noted by Mr. Weaver, those figures accounted for such things as (1) fossil fuel expenses, (2) nuclear fuel rent, decontamination fund payments, and SNF disposal costs, (3) net sulfur dioxide emission credits, (4) nitrogen oxide emission costs, (5) the cost of purchased power, (6) charges for energy taken from the AEP power pool, (7) credits for surplus power delivered to the pool, (8) revenues for committed and uncommitted system sales, and (9) adjustments required to exclude affiliated transportation costs associated with firm load.

According to his computations, Mr. Weaver testified that the 2004 power supply costs for I&M's St. Joseph rate area will total approximately $72.7 million. Based on an estimated net energy requirement of 24,101 gigawatt-hours (Gwh) "before consideration of any line losses," he continued, this rate area's total PSCR costs for 2004 would be 3.017 mills per kWh. Tr. 149. With regard to the Three Rivers rate area, Mr. Weaver stated that 2004 power supply costs would total approximately $200.7 million and that the net energy requirement would be 24,185 GWh, thus resulting in PSCR costs of 8.301 mills per kWh.[2] As before, Mr. Weaver noted that these figures do not account for any line losses. *See*, Tr. 151.

I&M's fourth witness was Donald M. Schlegel, the Manager of AEP Service Corporation's Resource Planning Section. Mr. Schlegel provided the load forecast (including peak demand and annual energy requirements) for both I&M and the eastern part of the AEP system, as well as their respective levels of generating capacity and proposed reserve margins. Based on those figures, he went on to compute I&M's generation forecast on a month-by-month basis for 2004 and on an annual basis for the period covered by the utility's five-year forecast. Mr. Schlegel concluded by noting that I&M's generating units "are operated on an integrated basis (i.e., centrally dispatched) with the

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[2] The difference in the cost per kWh from one rate area to the next apparently arises--to at least some extent--from the fact that the computation of the Three Rivers rate area's PSCR factor is based on the Federal Energy Regulatory Commission's "Net Energy Cost" method. *See*, Tr. 150.

units of the other AEP companies to meet the total system load requirements of all the operating companies on the most economical basis." Tr. 185.

The utility's fifth and final witness was David L. Hille, a Senior Regulatory Consultant in I&M's Regulatory Services Department. In the course of his direct testimony, Mr. Hille described how--based on the underlying information provided by the preceding witnesses--I&M computed the 2004 PSCR factors proposed for use in the utility's St. Joseph and Three Rivers rate areas, as well as how the utility's proposed tariff sheet revisions were developed. Mr. Hille's computations, which included applying various loss factors and subtracting the previously-established PSCR cost base established for each of I&M's rate areas, resulted in proposed 2004 PSCR factors of negative 0.10 mills per kWh for the St. Joseph rate area and negative 1.35 mills per kWh for the Three Rivers rate area. Mr. Hille also provided rebuttal testimony in which he disputed claims that his application of I&M's loss factors somehow overstated the utility's projected SNF disposal fees.

The only other witness presented in this case was Ronald C. Callen, a consultant testifying on behalf of the MEC. Mr. Callen began by describing the electric industry's troubled history regarding SNF disposal. Specifically, he pointed out that although utilities with nuclear plants have long been required to contribute funds to the DOE for construction of a national spent fuel repository, little progress has been made toward opening such a facility. As a result, he points out, utilities like I&M are bearing the cost of storing SNF on site (either by expanding their storage pools or by

implementing dry cask storage programs) while concurrently paying for a federal disposal facility whose construction has not yet begun.

Mr. Callen went on to state that, in his opinion, insufficient support exists for including--as part of I&M's 2004 PSCR factors--the DOE's 1 mill per kWh SNF disposal fee. Rather, he continued, I&M has not been reasonable and prudent regarding its ongoing payment of that fee because it "has failed to undertake necessary or sufficient action to mitigate or minimize these costs, or to seek protection of the amounts" provided to the DOE in response to those SNF-related assessments. Tr. 229. Mr. Callen further contends that I&M incorrectly calculated the SNF fee included in I&M's proposed 2004 PSCR factors. This is based on his belief that the utility's calculations incorrectly adjusted the fee to include in-plant use and line losses.

In light of Mr. Callen's testimony, the MEC has raised two objections regarding the utility's plan. First, it argues that the Commission should disallow approximately $2,312,250 of I&M's alleged 2004 PSCR costs. That figure represents I&M's share (roughly 15%) of the projected $15,415,000 SNF disposal fee that the DOE will receive on behalf of the entire AEP system during 2004. Failing that, the MEC continues, the utility must be directed to file "a supplemental application detailing why the Commission should determine that continued flow-through in PSCR rates of all SNF fee costs remains reasonable and prudent." MEC's reply brief, p. 2. Only after reviewing that supplemental application and examining all additional testimony offered by the utility, the MEC asserts, would the Commission be in a position to rule in favor

of I&M's plan to continue passing on SNF disposal fees to its PSCR customers. Second, the MEC contends that the Commission should at least reduce any recoverable SNF fee costs by between $139,000 and $162,000 to correct what it views as a computational error by the utility regarding the effect of in-plant usage and line losses.

The Staff did not present any witnesses and simply "recommends that the Commission find I&M's plan to be reasonable and prudent." Staff's brief, p. 2. In so doing, however, it notes that one aspect of the utility's plan diverges from past Commission practice. Namely, the Staff points out, I&M's 2004 PSCR plan for its St. Joseph rate area includes the net effect of all expenses and credits arising from the utility's sulfur dioxide (SO_2) emissions allowances. Notwithstanding prior Commission orders specifically excluding the financial effects of emission allowance usage and trading from the computation of a utility's PSCR factor, the Staff concludes that it is reasonable--at least in this instance--to deviate from past practice.

IV.

DISCUSSION AND FINDINGS

As indicated above, only three areas of dispute exist with regard to I&M's 2004 PSCR plan. The first involves the MEC's claim that, at least thus far, the utility has not justified the continued recovery from PSCR customers of its post-1983 SNF disposal fee costs. The second issue relates to whether, assuming SNF disposal fees may be recovered through I&M's 2004 PSCR factors, the utility correctly computed the

total amount of those fees. The third and final issue concerns the utility's proposal to include the financial effects of certain emission allowances in the calculation of its PSCR factors. Each of these matters is discussed below.

Proposed Disallowance of SNF Fees

Based in large part on the testimony provided by Mr. Callen, the MEC asserts that I&M failed to adequately support its proposal to continue collecting from its PSCR customers--and forwarding to the DOE --the 1 mill per kWh SNF disposal fee. Although conceding that I&M has participated in lawsuits arising from the DOE's default (including an ongoing Court of Claims action seeking reimbursement of SNF disposal fees), the MEC contends that those actions "do not comprise the full panoply of remedies" that, at least in its opinion, the utility should pursue. MEC's brief, p. 11. Rather, the MEC argues, "any ongoing payments should be subject to protective terms and conditions." *Id.* at 12. Specifically, it continues, the utility should undertake self-help remedies, such as escrowing all SNF disposal fees collected from its PSCR customers pending a determination regarding whether the DOE will actually perform its disposal duties. Absent such steps, the MEC claims, I&M's continued collection of SNF disposal fees from its customers and distribution of those fees to the DOE is not reasonable and prudent. The MEC therefore seeks disallowance of all costs related to SNF disposal. At the very least, the MEC continues, the utility "should be required to re-file its PSCR plan case and forecast to include complete detail and information" concerning all SNF-related issues. *Id.* at 17.

I&M responds by noting that, pursuant to the Nuclear Waste Policy Act of 1982 (NWPA), all utilities with nuclear generation facilities were required to sign Standard Contracts with the DOE for the disposal of SNF. To ensure compliance with that requirement, the NWPA directed that the Nuclear Regulatory Commission "shall not issue or renew a license" for any nuclear power plant whose owner fails to enter into a contract with the DOE that, among other things, demands payment into the Nuclear Waste Fund of 1 mill per kWh of electricity generated and sold as a result of the plant's operation. *See*, 42 USC § 10222. According to I&M, those contracts require that all post-1983 SNF disposal fees be deposited quarterly with the U.S. Treasury. Moreover, they provide that any late payment of SNF disposal fees will result in the imposition of interest charges and that non-payment may serve to release the federal government from its obligation to ultimately take possession of the SNF. *See, i.e.*, 10 CFR, Part 961.

The regulatory structure described by I&M was confirmed by Mr. Malin. Specifically, Mr. Malin testified that:

> [T]here is what is known as a viability assessment performed by the Nuclear Regulatory Commission--I don't know chapter and verse, statutes, et cetera--but essentially it says, if you do not have a place to put your spent nuclear fuel, you do not have, or will not have, a license to operate a facility that brings electricity to the community.

> To date, the only acceptable source to permanently store nuclear fuel as part of this viability assessment is the Department of Energy; there are no other facilities, and this is what is accepted by the Nuclear Regulatory Commission.
>
> * * *
>
> [Moreover, we] don't want to make late payments because it would result in interest charges. DOE could suspend the contract, [but] it wouldn't relieve us of the obligation and we would run the risk of severe consequences, and that includes the viability determination by the Nuclear Regulatory Commission, the continuance of our operating license, and the operation and benefit of the facility.

Tr. 126-127. Furthermore, he testified that the utility has participated in at least four legal actions brought against the DOE in an attempt to force the agency to adhere to its obligations under the Standard Contract. *See*, Tr. 115-118.

As a result, I&M contends, the utility's continued recovery of post-1983 SNF fee costs from its PSCR customers, as well as its proposal to continue depositing those fees in the DOE's Nuclear Waste Fund throughout the 2004 PSCR plan year, is reasonable and prudent. I&M therefore asserts that the MEC's requested disallowance should be rejected. It further asserts that no justification exists for making the utility re-file its PSCR plan.

With regard to this issue, the Staff supports I&M's continued collection from its PSCR customers of the 1 mill per kWh SNF disposal fee. This is based on the Staff's view that the utility's proposal "is consistent with prior I&M PSCR cases," in which the Commission has consistently approved recovery of the SNF disposal fee costs through the utility's PSCR clause. Staff's brief, p. 2.

Regarding this matter, the first issue to address is whether I&M's plan to continue paying the DOE's post-1983 SNF disposal fees while storing SNF on site is reasonable and prudent. As noted in several cases previously before the Commission,[3] this does not involve the usual Act 304 exercise of properly assessing market forces and alternate supplies of energy. No market exists for SNF storage. Moreover, there are few, if any, reasonable alternatives. In fact, the only current option is on site storage, and the only future option appears to be the DOE's SNF disposal program. Given these limited options, the ALJ finds that it remains reasonable and prudent for I&M's customers to continue paying into the Nuclear Waste Fund--as required by the NWPA--during the 2004 PSCR plan year. Failure to do so (by unilaterally escrowing those payments, as advocated by the MEC) could result in the imposition of interest charges, lead to revocation of the utility's license to operate the Cook Nuclear Plant, and render I&M ineligible from someday using the DOE's permanent storage facility.

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[3] *See, i.e.*, the PFDs and orders issued in Cases Nos. U-12613, U-12614, and U-12615.

The second issue concerns the MEC's request that the Commission order I&M to re-file its PSCR plan in a manner that provides additional detail on all SNF-related matters. With regard to this issue, the ALJ agrees with the utility and finds that the testimony offered by Mr. Malin--which includes a discussion of (1) I&M's history concerning SNF disposal, (2) the steps the utility has taken to enforce its Standard Contract with the DOE, and (3) the reasons that post-1983 SNF disposal fees must continue to be paid by I&M--is adequate for purposes of this proceeding. Clearly, the MEC seeks a broader discussion regarding SNF disposal and the DOE's failure to adhere to the timeframes set forth in the Standard Contracts signed with numerous utilities across the country. However, that discussion is not germane to a PSCR plan case, where the primary focus is to provide the utility (hopefully, well before the close of the plan year) with direction regarding its proposed fuel purchases.

Undoubtedly, the SNF disposal issues confronting I&M and the nuclear generation industry as a whole are significant, both from an economic and an environmental standpoint. It is equally obvious that the long-awaited solution (in the form of a federally-operated, permanent storage facility) will not be implemented in accordance with the DOE's contractual timetable. For better or worse, the SNF storage issue is a political dilemma over which I&M, the Commission, and perhaps the DOE itself, have little influence. Thus, for the reasons stated above, the ALJ recommends that the Commission deny the MEC's request to either disallow the recovery of post-1983 SNF disposal fee costs through I&M's 2004 PSCR factor or order the utility to re-file its plan case.

I&M's Application of Loss Factors

The MEC further contends that the utility incorrectly computed the projected level of post-1983 SNF disposal fees. Specifically, Mr. Callen asserted that I&M applied various loss factors (which are designed to account for the cost of in-plant electric usage and line losses experienced over the utility's transmission and distribution system) to its projected 2004 SNF disposal fees, thereby overstating its proposed payments to the DOE by between $139,000 and $162,000. Because electric utilities are only required to pay a fee of 1 mill per kWh of electricity "generated and sold" as a result of their nuclear plants' operation, he continued, I&M's inclusion of loss factors in the calculation of its SNF disposal costs "may actually overstate the SNF fee by 12 percent or 14 percent . . .." Tr. 236-237.

I&M responds by claiming that the MEC's challenge to its calculation of the annual SNF disposal fee is misplaced. This is because, I&M asserts, the MEC failed to recognize the distinction between calculating the SNF fee cost for purposes of payment to the DOE, on the one hand, and computing the PSCR factor necessary for recovery of that cost, on the other. Based on testimony provided by Mr. Malin, the utility contends that its computation of the fee to be paid to the DOE is correct, having been calculated on the basis of 1 mill per kWh of electricity generated and sold. After that computation was complete (thus establishing the projected amount of SNF disposal fees to be paid to the DOE during 2004), the utility combined these and all other projected costs to compute its total 2004 PSCR costs. It is at this point,

I&M notes, that the utility's total PSCR costs were finally adjusted by Mr. Hille to reflect in-plant usage and line losses, thus resulting in the utility's proper 2004 PSCR factors for both the St. Joseph and Three Rivers rate areas. Therefore, the utility concludes, the MEC's arguments regarding the allegedly improper application of these loss factors should be rejected.

The ALJ agrees with the utility. As specifically noted by Mr. Malin, I&M's projected post-1983 SNF disposal fees "were calculated based on the rate of one mill per [kWh] of electricity generated and sold," in accordance with the NWPA. Tr. 96. This is supported by the fact that, according to Exhibits A-3 and A-4, total projected post-1983 SNF disposal fee costs are slightly less than 1 mill per kWh of projected net nuclear generation (thus confirming that the utility's figures are based on the amount of electricity "generated and sold" as opposed to simply the amount generated). As a result, the MEC is incorrect in its belief that I&M plans to include, as part of its total PSCR costs, post-1983 SNF disposal fees in excess of those actually owed to the DOE.

Moreover, as pointed out by Mr. Hille, the subsequent application of loss factors to I&M's total projected PSCR costs--when computing the utility's actual 2004 PSCR factors--does nothing to alter the SNF disposal fee. Specifically, he explained that:

> The total projected PSCR costs, the numerator, are divided by the net energy requirement, the denominator, to derive PSCR costs on a mills per kWh basis. The net energy requirement at that point reflects net energy at

> the source. The application of a loss factor is not adjusting PSCR costs, the numerator, but is adjusting the net energy requirement, the denominator, to reflect losses from the source to the point of usage – the customer. Therefore, the SNF fee developed by Mr. Malin is not adjusted.

Tr. 202-203. Because adjustments to account for in-plant usage and line losses have long been acknowledged as proper when computing the specific PSCR factors to be assessed to a utility's customers, and because these adjustments do not change the underlying costs (such as I&M's SNF disposal fee expense), the Commission should reject the MEC's requested disallowance.

Emission Allowances

The final issue to address is the utility's proposal to include in the computation of at least some of its 2004 PSCR factors[4] certain expenses and credits related to emission allowances. Specifically, when describing the manner in which he computed proposed factors for the St. Joseph rate area, Mr. Weaver testified that he

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[4] Although testimony and exhibits offered by Mr. Weaver address the extent to which emission allowance credits and expenses have been factored into I&M's proposed PSCR factors for the St. Joseph rate area, it appears that no such information was offered regarding the Three Rivers rate area. Obviously, if similar credits and expenses are included in the utility's calculation of proposed factors for the Three Rivers rate area, all recommendations concerning emission allowance credits and expenses would also apply to the final determination of that rate area's PSCR factors.

included SO_2 emission allowance expenses of $4,345,000 and credits of $12,678,000 (resulting in a net credit of $8,333,000). *See*, Tr. 139-140. That net credit was included on line 6 of Exhibit A-5, which reflects his computation of the St. Joseph rate area's 2004 PSCR factor.

The Staff points out that, in prior cases, "the Commission has determined that SO_2 allowance costs should be excluded from PSCR recovery." Staff's brief, p. 2. Nevertheless, the Staff believes that circumstances warrant including those costs, along with their countervailing credits, in this situation. Specifically, it notes that the AEP system functions under an operating agreement that requires each member to share certain system costs and benefits. Moreover, the Staff continues, compliance with SO_2 emission limits is being met on a system-wide basis. "Given that I&M's customers are paying their portion of the costs for AEP system SO_2 compliance," the Staff contends, those customers are entitled to their portion of the benefits arising from AEP's sale of unused SO_2 emission allowances. *Id.* Thus, notwithstanding the Commission's prior rulings to the contrary, the Staff supports I&M's inclusion of the $8,333,000 net credit when computing its 2004 PSCR plan costs. Neither the utility nor MEC specifically addresses this issue in its briefs or reply briefs.

The Commission has, on numerous occasions, excluded from the computation of PSCR factors the financial effects of emission allowance purchases, consumption, and trading. For example, in its September 12, 1997 order in Case No. U-10710-R, the Commission specifically held that revenues and costs

related to SO_2 allowances should not be passed through a utility's PSCR clause. Similarly, in its November 11, 2001 order in Case No. U-12615, the Commission ruled that costs relating to things like ash disposal, fuel handling, dry cask SNF storage, and SO_2 emissions allowances should not be included in the computation of a PSCR factor. These decisions were based on the Commission's "longstanding administrative practice [of construing] Act 304 to exclude those expenses from 'the booked costs . . . of fuel burned by the utility for electric generation,' which are recoverable through a PSCR clause." November 20, 2001 order in Case No. U-12615 at p. 4 [quoting MCL 460.6j(1)(a)].

Clearly, the Commission, as an administrative agency, has the right to change course on this issue. Doing so in the present case is particularly tempting in that, at least for 2004, it would provide I&M's PSCR customers in the St. Joseph rate area with a net SO_2 emissions allowance credit estimated at over $8.3 million. However, it would also run the risk of opening a virtual Pandora's box with regard to cost recovery via the PSCR process. Specifically, approving I&M's current proposal could throw open the door to future recovery, through various utilities' PSCR factors, of SO_2 allowance costs, ash disposal fees, fuel handling expenses, dry cask storage costs, and the like (all of which have previously been found by the Commission to be beyond the scope of Act 304). This risk, when coupled with the fact that these costs do not stand in close relationship to "fuel burned by the utility for electric generation"--as required by Section 6j(1)(a) of Act 304--militates against departing from the Commission's prior line of decisions. The ALJ

therefore recommends removing from the computation of I&M's 2004 PSCR factors all expenses and credits relating to the utility's SO_2 emissions allowances.

This recommendation, however, raises a related issue. Specifically, both Mr. Weaver's testimony and line 7 of Exhibit A-5 indicate that I&M seeks to include $1,014,000 of nitrogen oxide (NO_X) emission allowance costs in the computation of its 2004 PSCR factors for the St. Joseph rate area. According to Mr. Weaver, these costs are determined in the same basic manner as SO_2 emission allowance costs, except that unlike the SO_2-based expenses (which occur year-round), NO_X emission allowances are consumed only during the "ozone season" months of May through September. Tr. 142.

Nowhere in their briefs do the parties discuss the propriety of including these costs in the calculation of I&M's PSCR factors. Nevertheless, it seems obvious that the cost of NO_X emission allowances should be treated the same, at least for purposes of Act 304, as SO_2 emissions allowance costs. Therefore, consistent with the previous recommendation, the ALJ concludes that I&M's $1,014,000 of projected NO_X emission allowance costs also should be removed from the calculation of its 2004 PSCR factors for the St. Joseph rate area.

As can be seen by reference to Exhibit A-5, implementation of the ALJ's recommendations regarding SO_2 and NO_X emission allowances requires striking all figures set forth on lines 6 and 7 of that document. This has the effect of increasing the total cost figures on lines 24 and 26 of that exhibit by

$7,319,000 (which is the difference between the utility's net projected $8,333,000 SO_2-based credit and its expected $1,014,000 NO_x-based expense). As a result, estimated 2004 power supply costs for I&M's St. Joseph rate area would total $80,025,000 or 3.321 mills per kWh before consideration of any line losses. When these figures are substituted for the numbers initially included on Exhibit A-26 (at lines 3 and 5, respectively), they produce an adjusted 2004 PSCR factor of 0.22 mills per kWh for application in I&M's St. Joseph rate area.[5]

Finally, as mentioned in footnote 4, *supra*, it is unclear whether any similar emission allowance expenses or credits are included in I&M's calculation of its proposed factors for the Three Rivers rate area. If they are, adjustments like those recommended for the St. Joseph rate area's 2004 PSCR factors (to remove the effect of SO_2 and NO_x emission allowance expenses and credits) must also be made to the factors approved for use in the Three Rivers rate area.

V.

CONCLUSION

In light of the testimony and exhibits received in this case, the ALJ recommends finding that, with the single modification discussed above, I&M's 2004 PSCR

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[5] Based on information included in the utility's application, this adjusted PSCR factor would still represent a reduction of 2.21 mills per kWh from the factors approved for the St. Joseph rate area in I&M's most recent plan case.

plan is reasonable and prudent, and should be approved. As for that modification, the ALJ recommends that the Commission order I&M to remove from the calculation of its PSCR factors any and all effects of SO_2 and NO_x emission allowance expenses and credits.

Finally, it should be noted that any arguments not specifically addressed in this Proposal for Decision were deemed to be irrelevant to the ALJ's ultimate findings and conclusions in this proceeding.

MICHIGAN PUBLIC
SERVICE COMMISSION

/s/ Mark E. Cummins
Mark E. Cummins
Administrative Law Judge

June 4, 2004
Lansing, Michigan
dp

ISSUED AND SERVED: June 4, 2004

APPENDIX E

SUPREME COURT OF MICHIGAN

SC: 134474
COA: 264859
MPSC: 00-013919

[Filed May 27, 2008]

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP, Appellants,	)
v.	)
MICHIGAN PUBLIC SERVICE COMMISSION and INDIANA MICHIGAN POWER COMPANY, Appellees.	)

ORDER

On order of the Court, the motion for reconsideration of this Court's January 22, 2008 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously. The motion for stay is DENIED.

[Seal of the Michigan Supreme Court Lansing]

I, Corbin R. Davis, Clerk of theMichigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 27, 2008 /s/ Corbin R. Davis
Clerk

APPENDIX F

SUPREME COURT OF MICHIGAN

SC: 134474
COA: 264859
MPSC: 00-013919

[Filed January 22, 2008]

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP, Appellants,	)
v.	)
MICHIGAN PUBLIC SERVICE COMMISSION and INDIANA MICHIGAN POWER COMPANY, Appellees.	)

ORDER

On order of the Court, the application for leave to appeal the April 24, 2007 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

[Seal of the Michigan Supreme Court Lansing]

I, Corbin R. Davis, Clerk of theMichigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 22, 2008 /s/ Corbin R. Davis
Clerk

APPENDIX G

COURT OF APPEALS, STATE OF MICHIGAN

Docket No. 264859
LC No. 00-013919

[Filed June 7, 2007]

Michigan Environmental Council	)
	)
v.	)
	)
MPSC	)
	)

Henry William Saad Presiding Judge

Joel P. Hoekstra, Michael R. Smolenski Judges

ORDER

The Court orders that the motion for correction of Court's decision is DENIED. The Court further orders that the motion for reconsideration is DENIED.

/s/ H. W. Saad
Presiding Judge

[Seal of Court of Appeals
of the State of Michigan]

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

June 7, 2007 /s/ Sandra Schultz Mengel
Date Chief Clerk

APPENDIX H

Nuclear Wast Policy Act of 1982, as amended, 42 U.S.C. § 10101 et seq. (Relevant Provisions)

CHAPTER 108—NUCLEAR WASTE POLICY

42 U.S.C. § 10101. Definitions

For purposes of this chapter:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "affected Indian tribe" means any Indian tribe—

(A) within whose reservation boundaries a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste or spent fuel is proposed to be located;

(B) whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility: *Provided*, That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe,

that such effects are both substantial and adverse to the tribe;[1]

(3) The term "atomic energy defense activity" means any activity of the Secretary performed in whole or in part in carrying out any of the following functions:

(A) naval reactors development;
(B) weapons activities including defense inertial confinement fusion;
(C) verification and control technology;
(D) defense nuclear materials production;
(E) defense nuclear waste and materials by-products management;
(F) defense nuclear materials security and safeguards and security investigations; and
(G) defense research and development.

(4) The term "candidate site" means an area, within a geologic and hydrologic system, that is recommended by the Secretary under section 10132 of this title for site characterization, approved by the President under section 10132 of this title for site characterization, or undergoing site characterization under section 10133 of this title.

(5) The term "civilian nuclear activity" means any atomic energy activity other than an atomic energy defense activity.

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[1] So in original. The semicolon probably should be a period.

(6) The term "civilian nuclear power reactor" means a civilian nuclear powerplant required to be licensed under section 2133 or 2134 (b) of this title.

(7) The term "Commission" means the Nuclear Regulatory Commission.

(8) The term "Department" means the Department of Energy.

(9) The term "disposal" means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive material with no foreseeable intent of recovery, whether or not such emplacement permits the recovery of such waste.

(10) The terms "disposal package" and "package" mean the primary container that holds, and is in contact with, solidified high-level radioactive waste, spent nuclear fuel, or other radioactive materials, and any overpacks that are emplaced at a repository.

(11) The term "engineered barriers" means manmade components of a disposal system designed to prevent the release of radionuclides into the geologic medium involved. Such term includes the high-level radioactive waste form, high-level radioactive waste canisters, and other materials placed over and around such canisters.

(12) The term "high-level radioactive waste" means—

(A) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and

any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

(B) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

(13) The term "Federal agency" means any Executive agency, as defined in section 105 of title 5.

(14) The term "Governor" means the chief executive officer of a State.

(15) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village, as defined in section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602 (c)).

(16) The term "low-level radioactive waste" means radioactive material that—

(A) is not high-level radioactive waste, spent nuclear fuel, transuranic waste, or by-product material as defined in section 2014 (e)(2) of this title; and

(B) the Commission, consistent with existing law, classifies as low-level radioactive waste.

(17) The term "Office" means the Office of Civilian Radioactive Waste Management established in section 10224[2] of this title.

(18) The term "repository" means any system licensed by the Commission that is intended to be used for, or may be used for, the permanent deep geologic disposal of high-level radioactive waste and spent nuclear fuel, whether or not such system is designed to permit the recovery, for a limited period during initial operation, of any materials placed in such system. Such term includes both surface and subsurface areas at which high-level radioactive waste and spent nuclear fuel handling activities are conducted.

(19) The term "reservation" means—

(A) any Indian reservation or dependent Indian community referred to in clause (a) or (b) of section 1151 of title 18; or

(B) any land selected by an Alaska Native village or regional corporation under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).

(20) The term "Secretary" means the Secretary of Energy.

(21) The term "site characterization" means—

(A) siting research activities with respect to a test and evaluation facility at a candidate site; and

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[2] See References in Text note below.

(B) activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

(22) The term "siting research" means activities, including borings, surface excavations, shaft excavations, subsurface lateral excavations and borings, and in situ testing, to determine the suitability of a site for a test and evaluation facility.

(23) The term "spent nuclear fuel" means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

(24) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

(25) The term "storage" means retention of high-level radioactive waste, spent nuclear fuel, or transuranic waste with the intent to recover such

waste or fuel for subsequent use, processing, or disposal.

(26) The term "Storage Fund" means the Interim Storage Fund established in section 10156 (c)[3] of this title.

(27) The term "test and evaluation facility" means an at-depth, prototypic, underground cavity with subsurface lateral excavations extending from a central shaft that is used for research and development purposes, including the development of data and experience for the safe handling and disposal of solidified high-level radioactive waste, transuranic waste, or spent nuclear fuel.

(28) The term "unit of general local government" means any borough, city, county, parish, town, township, village, or other general purpose political subdivision of a State.

(29) The term "Waste Fund" means the Nuclear Waste Fund established in section 10222 (c) of this title.

(30) The term "Yucca Mountain site" means the candidate site in the State of Nevada recommended by the Secretary to the President under section 10132 (b)(1)(B) of this title on May 27, 1986.

(31) The term "affected u..it of local government" means the unit of local government with jurisdiction

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[3] See References in Text note below.

over the site of a repository or a monitored retrievable storage facility. Such term may, at the discretion of the Secretary, include units of local government that are contiguous with such unit.

(32) The term "Negotiator" means the Nuclear Waste Negotiator.

(33) As used in subchapter IV of this chapter, the term "Office" means the Office of the Nuclear Waste Negotiator established under subchapter IV of this chapter.

(34) The term "monitored retrievable storage facility" means the storage facility described in section 10161 (b)(1) of this title.

(Pub. L. 97–425, § 2, Jan. 7, 1983, 96 Stat. 2202; Pub. L. 100–202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329–104, 1329–121; Pub. L. 100–203, title V, § 5002, Dec. 22, 1987, 101 Stat. 1330–227.)

* * *

SUBCHAPTER I—DISPOSAL AND STORAGE OF HIGH-LEVEL RADIOACTIVE WASTE, SPENT NUCLEAR FUEL, AND LOW-LEVEL RADIOACTIVE WASTE

* * *

Part A—Repositories for Disposal of High-Level Radioactive Waste and Spent Nu-clear Fuel

42 U.S.C. § 10131. Findings and purposes

(a) The Congress finds that—

(1) radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;

(3) Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;

(4) while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

(5) the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this chapter;

(6) State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel; and

(7) high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.

(b) The purposes of this part are—

(1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such

waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

(Pub. L. 97-425, title I, §111, Jan. 7, 1983, 96 Stat. 2207.)

* * *

Part B—INTERIM STORAGE PROGRAM

42 U.S.C. § 10151. Findings and purposes

(a) The Congress finds that—

(1) the persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors, by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical;

(2) the Federal Government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor; and

(3) the Federal Government has the responsibility to provide, in accordance with the provisions of this part, not more than 1,900 metric tons of capacity for interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity at the sites of such reactors

when needed to assure the continued, orderly operation of such reactors.

(b) The purposes of this part are—

(1) to provide for the utilization of available spent nuclear fuel pools at the site of each civilian nuclear power reactor to the extent practical and the addition of new spent nuclear fuel storage capacity where practical at the site of such reactor; and

(2) to provide, in accordance with the provisions of this part, for the establishment of a federally owned and operated system for the interim storage of spent nuclear fuel at one or more facilities owned by the Federal Government with not more than 1,900 metric tons of capacity to prevent disruptions in the orderly operation of any civilian nuclear power reactor that cannot reasonably provide adequate spent nuclear fuel storage capacity at the site of such reactor when needed.

(Pub. L. 97-425, title I, §131, Jan. 7, 1983, 96 Stat. 2229.)

42 U.S.C. § 10152. Available capacity for interim storage of spent nuclear fuel

The Secretary, the Commission, and other authorized Federal officials shall each take such actions as such official considers necessary to encourage and expedite the effective use of available storage, and necessary additional storage, at the site of each civilian nuclear power reactor consistent with—

(1) the protection of the public health and safety, and the environment;
(2) economic considerations;
(3) continued operation of such reactor;
(4) any applicable provisions of law; and
(5) the views of the population surrounding such reactor.

(Pub. L. 97-425, title I, §132, Jan. 7, 1983, 96 Stat. 2230.)

* * *

SUBCHAPTER III—OTHER PROVISIONS RELATING TO RADIOACTIVE WASTE

42 U.S.C. § 10222. Nuclear Waste Fund

(a) Contracts

(1) In the performance of his functions under this chapter, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d) of this section.

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after January 7, 1983, establish a 1 time fee per kilogram of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt-hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section 10143 of this title, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c) of this section.[1] In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

(4) Not later than 180 days after January 7, 1983, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether

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[1] See References in Text note below.

collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) of this section. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d) of this section, the Secretary shall propose an adjustment to the fee to insure full cost recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 6421 of this title.

(5) Contracts entered into under this section shall provide that—

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.[1]

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(b) Advance contracting requirement

(1) (A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 2133 or 2134 of this title unless—

(i) such person has entered into a contract with the Secretary under this section; or

(ii) the Secretary affirms in writing that such person is actively and in good faith negotiating with the Secretary for a contract under this section.

(B) The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance or renewal of a license under section 2133 or 2134 of this title that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

(2) Except as provided in paragraph (1), no spent nuclear fuel or high-level radioactive waste generated or owned by any person (other than a department of the United States referred to in section 101 or 102 of title 5) may be disposed of by the Secretary in any repository constructed under this chapter unless the generator or owner of such spent fuel or waste has entered into a contract with the Secretary under this section by not later than—

(A) June 30, 1983; or
(B) the date on which such generator or owner commences generation of, or takes title to, such spent fuel or waste;

whichever occurs later.

(3) The rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.

(4) No high-level radioactive waste or spent nuclear fuel generated or owned by any department of the United States referred to in section 101 or 102 of title 5 may be disposed of by the Secretary in any repository constructed under this chapter unless such department transfers to the Secretary, for deposit in the Nuclear Waste Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such waste or spent fuel were generated by any other person.

(c) Establishment of Nuclear Waste Fund

There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. The Waste Fund shall consist of—

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e) of this section, which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on January 7, 1983, for functions or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

(d) Use of Waste Fund

The Secretary may make expenditures from the Waste Fund, subject to subsection (c) of this section, only for purposes of radioactive waste disposal activities under subchapters I and II of this chapter, including—

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored,[2] retrievable storage facility[3] or test and evaluation facility constructed under this chapter;

(2) the conducting of nongeneric research, development, and demonstration activities under this chapter;

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[2] So in original. The comma probably should not appear.

[3] So in original. Probably should be followed by a comma.

(3) the administrative cost of the radioactive waste disposal program;

(4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored,[2] retrievable storage site[3] or to be used in a test and evaluation facility;

(5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored,[2] retrievable storage site[3] or a test and evaluation facility site and necessary or incident to such repository, monitored,[2] retrievable storage facility[3] or test and evaluation facility; and

(6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

No amount may be expended by the Secretary under this subchapter[4] for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

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[4] See References in Text note below.

(e) Administration of Waste Fund

(1) The Secretary of the Treasury shall hold the Waste Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Waste Fund during the preceding fiscal year.

(2) The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of title 31. The budget of the Waste Fund shall consist of the estimates made by the Secretary of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Waste Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.

(3) If the Secretary determines that the Waste Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States—

(A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Waste Fund; and

(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average

market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of amounts from the Waste Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of title 31.

(5) If at any time the moneys available in the Waste Fund are insufficient to enable the Secretary to discharge his responsibilities under this subchapter,[5] the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the Waste Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under

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[5] See References in Text note below.

this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under such Act[5] are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(6) Any appropriations made available to the Waste Fund for any purpose described in subsection (d) of this section shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations available to the Waste Fund, less the average undisbursed cash balance in the Waste Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

(Pub. L. 97-425, title III, §302, Jan. 7, 1983, 96 Stat. 2257.)

REFERENCES IN TEXT

Subsection (c) of this section, referred to in subsec. (a)(3), was in the original "subsection (c) 126(b)" and was translated as subsection (c) of this section as the probable intent of Congress in view of the establishment of the Nuclear Waste Fund by subsec. (c) of this section and the absence of a section 126 in Pub. L. 97-425.

This subchapter, referred to in subsecs. (a)(5)(B), (d), and (e)(5), was in the original "this subtitle", and was translated as this subchapter to reflect the probable intent of Congress because title III of Pub. L. 97-425, which enacted this subchapter, does not contain subtitles.

Such Act, referred to in subsec. (e)(5), probably means chapter 31 of Title 31, Money and Finance.

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (e)(1) of this subsection relating to annual report to Congress, see section 303 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and the 4th item on page 143 of House Document No. 103-7.

42 U.S.C. § 10223. Alternative means of financing

The Secretary shall undertake a study with respect to alternative approaches to managing the construction and operation of all civilian radioactive waste management facilities, including the feasibility

of establishing a private corporation for such purposes. In conducting such study, the Secretary shall consult with the Director of the Office of Management and Budget, the Chairman of the Commission, and such other Federal agency representatives as may be appropriate. Such study shall be completed, and a report containing the results of such study shall be submitted to the Congress, within 1 year after January 7, 1983.

(Pub. L. 97-425, title II, §303, Jan. 7, 1983, 96 Stat. 2261.)

42 U.S.C. § 10224. Office of Civilian Radioactive Waste Management

(a) Establishment

There hereby is established within the Department of Energy an Office of Civilian Radioactive Waste Management. The Office shall be headed by a Director, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at the rate payable for level IV of the Executive Schedule under section 5315 of title 5.

(b) Functions of Director

The Director of the Office shall be responsible for carrying out the functions of the Secretary under this chapter, subject to the general supervision of the Secretary. The Director of the Office shall be directly responsible to the Secretary.

(c) Annual report to Congress

The Director of the Office shall annually prepare and submit to the Congress a comprehensive report on the activities and expenditures of the Office.

(d) Audit by GAO

If requested by either House of the Congress (or any committee thereof) or if considered necessary by the Comptroller General, the Government Accountability Office shall conduct an audit of the Office, in accord with such regulations as the Comptroller General may prescribe. The Comptroller General shall have access to such books, records, accounts, and other materials of the Office as the Comptroller General determines to be necessary for the preparation of such audit. The Comptroller General shall submit a report on the results of each audit conducted under this section.

(Pub. L. 97-425, title III, §304, Jan. 7, 1983, 96 Stat. 2261; Pub. L. 104-66, title I, §1052(l), Dec. 21, 1995, 109 Stat. 719; Pub. L. 108-271, §8(b), July 7, 2004, 118 Stat. 814.)

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APPENDIX I

TITLE 10: ENERGY
CHAPTER III—DEPARTMENT OF ENERGY
SUBCHAPTER I—SALES REGULATION

PART 961—STANDARD CONTRACT FOR DISPOSAL OF SPENT NUCLEAR FUEL AND/OR HIGH-LEVEL RADIOACTIVE WASTE

Subpart A—General

Sec.

§ 961.1 Purpose.
§ 961.2 Applicability.
§ 961.3 Definitions.
§ 961.4 Deviations.
§ 961.5 Federal agencies.

Subpart B—Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

§ 961.11 Text of the contract.

AUTHORITY: Sec. 644, Pub. L. 95–91, 91 Stat. 599 (42 U.S.C. 7254) and sec. 302, Pub. L. 97–425, 96 Stat. 2257 (42 U.S.C. 10222).

SOURCE: 48 FR 16599, Apr. 18, 1983, unless otherwise noted.

Subpart A—General

§ 961.1 Purpose.

This part establishes the contractual terms and conditions under which the Department of Energy (DOE) will make available nuclear waste disposal services to the owners and generators of spent nuclear fuel (SNF) and high-level radioactive waste (HLW) as provided in section 302 of the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425). Under the contract set forth in §961.11 of this part, DOE will take title to, transport, and dispose of spent nuclear fuel and/or high-level radioactive waste delivered to DOE by those owners or generators of such fuel or waste who execute the contract. In addition, the contract will specify the fees owners and generators of SNF and/or HLW will pay for these services. All receipts, proceeds, and revenues realized by DOE under the contract will be deposited in the Nuclear Waste Fund, an account established by the Act in the U.S. Treasury. This fund will pay for DOE's radioactive waste disposal activities, the full costs of which will be borne by the owners and generators under contract with DOE for disposal services.

§ 961.2 Applicability.

This part applies to the Secretary of Energy or his designee and any person who owns or generates spent nuclear fuel or high-level radioactive waste, of domestic origin, generated in a civilian nuclear power reactor. If executed in a timely manner, the contract contained in this part will commit DOE to accept title to, transport, and dispose of such spent fuel and waste.

In exchange for these services, the owners or generators of such fuel or waste shall pay fees specified in the contract which are intended to recover fully the costs of the disposal services to be furnished by DOE. The contract must be signed by June 30, 1983, or by the date on which such owner or generator commences generation of, or takes title to, such spent fuel or waste, whichever occurs later.

§ 961.3 Definitions.

For purposes of this part—

Act means the Nuclear Waste Policy Act of 1982, Public Law 97–425, 96 Stat. 2201 *et seq.*, 42 U.S.C. 10101 *et seq.*

Contract means the agreement set forth in §961.11 of this part and any duly executed amendment or modification thereto.

Generator means any person who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of section 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134).

Owner means any person who has title to spent nuclear fuel or high-level radioactive waste.

Purchaser means any person, other than a Federal agency, who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of sections 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134) or

who has title to spent nuclear fuel or high level radioactive waste and who has executed a contract with DOE.

Secretary means the Secretary of Energy of his designee.

Other definitions relating to the subject matter of this rule are set forth in Article II of the contract which is contained in §961.11, Text of the contract, of this part.

§ 961.4 Deviations.

Requests for authority to deviate from this part shall be submitted in writing to the Contracting Officer, who shall forward the request for approval to the Senior Procurement Official, Headquarters. Each request for deviation shall contain the following information:

(a) A statement of the deviation desired, including identification of the specific paragraph number(s) of the contract;

(b) A description of the intended effect of the deviation;

(c) The reason why the deviation is considered necessary or would be in the best interests of the Government;

(d) The name of the owner or generator seeking the deviation and nuclear power reactor(s) affected;

(e) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;

(f) A statement of the period of time for which the deviation is needed; and

(g) Any pertinent background information will contribute to a full understanding of the desired deviation.

§ 961.5 Federal agencies.

Federal agencies or departments requiring DOE's disposal services for SNF and/or HLW will be accommodated by a suitable interagency agreement reflecting, as appropriate, the terms and conditions set forth in the contract in §961.11; *Provided, however,* that the fees to be paid by Federal agencies will be equivalent to the fees that would be paid under the contract.

Subpart B—Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

§ 961.11 Text of the contract.

The text of the standard contract for disposal of spent nuclear fuel and/or high/level radioactive waste follows:

U.S. DEPARTMENT OF ENERGY CONTRACT NO.

___

Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

THIS CONTRACT, entered into this _____ day of _____ 19___, by and between the UNITED STATES OF AMERICA (hereinafter referred to as the "Government"), represented by the UNITED STATES DEPARTMENT OF ENERGY (hereafter referred to as "DOE") and _____, (hereinafter referred to as the "Purchaser"), a corporation organized and existing under the laws of the State of _____ [add as applicable: "acting on behalf of itself and ___."].

Witnesseth that:

Whereas, the DOE has the responsibility for the disposal of spent nuclear fuel and high-level radioactive waste of domestic origin from civilian nuclear power reactors in order to protect the public health and safety, and the environment; and

Whereas, the DOE has the responsibility, following commencement of operation of a repository, to take title to the spent nuclear fuel or high-level radioactive waste involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent nuclear fuel; and

Whereas, all costs associated with the preparation, transportation, and the disposal of spent nuclear fuel and high-level radioactive waste from civilian nuclear

power reactors shall be borne by the owners and generators of such fuel and waste; and

Whereas, the DOE is required to collect a full cost recovery fee from owners and generators delivering to the DOE such spent nuclear fuel and/or high level radioactive waste; and

Whereas, the DOE is authorized to enter into contracts for the permanent disposal of spent nuclear fuel and/or high-level radioactive waste of domestic origin in DOE facilities; and

Whereas, the Purchaser desires to obtain disposal services from DOE; and

Whereas, DOE is obligated and willing to provide such disposal services, under the terms and conditions hereinafter set forth; and

Whereas, this contract is made and entered into under the authority of the DOE Organization Act (Pub. L. 95–91, 42 U.S.C. 7101 *et seq.*) and the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425, 42 U.S.C. 10101 *et seq.*)

Now, therefore, the parties hereto do hereby agree as follows:

ARTICLE I—DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

1. The term *assigned three-month period* means the period that each Purchaser will be assigned by DOE, giving due consideration to the Purchaser's assignment preference, for purposes of reporting kilowatt hours generated by the Purchaser's nuclear power reactor and for establishing fees due and payable to DOE.

2. The term *cask* means a container for shipping spent nuclear fuel and/or high-level radioactive waste which meets all applicable regulatory requirements.

3. The term *civilian nuclear power reactor* means a civilian nuclear powerplant required to be licensed under sections 103 or 104(b) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2133, 2134(b)).

4. The term *Commission* means the United states Nuclear Regulatory Commission.

5. The term *contract* means this agreement and any duly executed amendment or modification thereto.

6. The term *Contracting Officer* means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly disignated Contracting Officer of the DOE; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

7. The term *delivery* means the transfer of custody, f.o.b. carrier, of spent nuclear fuel or high-level radioactive waste from Purchaser to DOE at the

Purchaser's civilian nuclear power reactor or such other domestic site as may be designated by the Purchaser and approved by DOE.

8. The term *disposal* means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive waste with no foreseeable intent of recovery, whether or not such emplacement permits recovery of such waste.

9. The term *DOE* means the United States Department of Energy or any duly authorized representative thereof, including the Contracting Officer.

10. The term *DOE facility* means a facility operated by or on behalf of DOE for the purpose of disposing of spent nuclear fuel and/or high-level radioactive waste, or such other facility(ies) to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility.

11. The term *full cost recovery,* means the recoupment by DOE, through Purchaser fees and any interest earned, of all direct costs, indirect costs, and all allocable overhead, consistent with generally accepted accounting principles consistently applied, of providing disposal services and conducting activities authorized by the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425). As used herein, the term *cost* includes the application of Nuclear Waste Fund moneys for those uses expressly set forth in section 302 (d) and (e) of the said Act and all other uses specified in the Act.

12. The term *high-level radioactive waste* (HLW) means—

(a) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

(b) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

13. The term *electricity (kilowatt hours) generated and sold* means gross electrical output produced by a civilian nuclear power reactor measured at the output terminals of the turbine generator minus the normal onsite nuclear station service loads during the time electricity is being generated multiplied by the total energy adjustment factor. For purposes of this provision, the following definition shall apply:

a. The term *Total Energy Adjustment Factor (TEAF)* means the sum of individual owners' weighted energy adjustment factors.

b. The term *Weighted Energy Adjustment Factor (WEAF)* means the product of an owner's energy adjustment factor times the owner's share of the plant.

c. The term *Owner's Energy Adjustment Factor (OEAF)* means the sum of the individual owner's adjustment for sales to ultimate consumers and adjustment for sales for resale.

d. The term *Owner's Share of the plant (OS)* means the owner's fraction of metered electricity sales, the owner's fraction of plant ownership, or the sponsor company's fixed entitlement percentage of the plant's output. This definition includes joint owners of

generating companies or participants in a generation and transmission cooperative.

e. The term *Adjustment for Sales to ultimate Consumer (ASC)* means the owner's fraction of sales to the ultimate consumer multiplied by the owner's sales to ultimate consumer adjustment factor.

f. The term *Fraction of Sales to ultimate Consumer (FSC)* means the owner's fractional quantity of electricity sold to the ultimate consumer relative to the total of electricity sales (sales to ultimate consumers plus the sales for resale).

g. The term *Sales to ultimate Consumer Adjustment Factor (SCAF)* means one minus the quotient of all electricity lost or otherwise not sold for each owner divided by the total electricity available for disposition to ultimate consumers. Electricity lost or otherwise not sold includes:

(1) Energy furnished without charge;

(2) Energy used by the company;

(3) Transmission losses;

(4) Distribution losses; and

(5) Other unaccounted losses as reported to the Federal Government "Annual Report of Major Electric Utilities, Licensees and Others," Federal Energy Regulatory Commission (FERC) Form No.1; Rural Electrification Administration (REA) Forms 7 and 11 if appropriate; or the "Annual Electric Utility Report," Energy Information Administration (EIA) Form EIA–861.

h. The term *Total Electricity Available for Disposition to Ultimate Consumers* means the reporting year's total of all of a utility's electricity supply which is available for disposition, expressed in kilowatt hours, and is equal to the sum of the energy

sources minus the electricity sold for resale by the utility.

i. The term *Adjustment for Sales for Resale (ASR)* means the owner's fraction of sales for resale multiplied by the national average adjustment factor.

j. The term *Fraction of Sales for Resale (FSR)* means the owner's fractional quantity of electricity sold for resale by the utility relative to the total of electricity sales.

k. The term *National Average Adjustment Factor (NAF)* means the ratio of the national total of electricity sold to the national total of electricity available for disposition, based on the most recent 3 years of national data provided to the Federal Government, and will be set by the Contracting Officer. This term will be evaluated annually and revised in increments of .005.

l. Pumped storage losses. If the proportion of nuclear generated electricity consumed by a pumped-storage hydro facility can be measured or estimated and if the electricity losses associated with pumped storage facilities can be documented (e.g. based on routine and uniform records of district power data on contributions from different electricity sources), a prorated nuclear share shall be allowed as an offset to gross electricity generation reported on the annex A of appendix G, NWPA–830G form. Specific methodologies for calculating these offsets must be approved by the Contracting Officer in advance.

Instructions to annex A of appendix G, NWPA–830G provide the necessary information to calculate the energy adjustment factors.

14. The term *metric tons uranium* means that measure of weight, equivalent to 2,204.6 pounds of

uranium and other fissile and fertile material that are loaded into a reactor core as fresh fuel.

15. The term *Purchaser's site* means the location of Purchaser's civilian nuclear power reactor or such other location as the Purchaser may designate.

16. The term *quarterly Treasury rate* means the current value of funds rate as specified by the Treasury Fiscal Requirements Manual, Volume 1, Part 6, section 8020.20. This rate is published quarterly in the FEDERAL REGISTER prior to the beginning of the affected quarter.

17. The term *shipping lot* means a specified quantity of spent nuclear fuel or high-level radioactive waste designated by Purchaser for delivery to DOE beginning on a specified date.

18. The term *spent nuclear fuel* (SNF) means fuel that has been withdrawn from a nuclear reactor following irradiation, the consistituent elements of which have not been separated by reprocessing.

19. The term *spent nuclear fuel and high-level radioactive waste of domestic origin* means irradiated fuel material used, and radioactive wastes resulting from such use, in nuclear power reactors located only in the United States.

20. The term *year* means the period which begins on October 1 and ends on September 30.

ARTICLE II—SCOPE

This contract applies to the delivery by Purchaser to DOE of SNF and/or HLW of domestic origin from civilian nuclear power reactors, acceptance of title by DOE to such SNF and/or HLW, subsequent transportation, and disposal of such SNF and/or HLW and, with respect to such material, establishes the fees to be paid by the Purchaser for the services to be rendered hereunder by DOE. The SNF and/or HLW shall be specified in a delivery commitment schedule as provided in Article V below. The services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF and/or HLW from the civilian nuclear power reactors specified in appendix A, annexed hereto and made a part hereof, has been disposed of.

ARTICLE III—TERM

The term of this contract shall be from the date of execution until such time as DOE has accepted, transported from the Purchaser's site(s) and disposed of all SNF and/or HLW of domestic origin from the civilian nuclear power reactor(s) specified in appendix A.

ARTICLE IV—RESPONSIBILITIES OF THE PARTIES

A. Purchaser's Responsibilities

1. *Discharge Information.*

(a) On an annual basis, commencing October 1, 1983, the Purchaser shall provide DOE with

information on actual discharges to date and projected discharges for the next ten (10) years in the form and content set forth in appendix B, annexed hereto and made a part hereof. The information to be provided will include estimates and projections and will not be Purchaser's firm commitment with respect to discharges or deliveries.

(b) No later than October 1, 1983, the Purchaser shall provide DOE with specific information on:

(1) Total spent nuclear fuel inventory as of April 7, 1983;

(2) Total number of fuel assemblies removed from the particular reactor core prior to 12:00 a.m. April 7, 1983 for which there are plans for reinsertion in the core, indicating the current planned dates for reinsertion in the core. Estimates of the burned and unburned portion of each individual assembly are to be provided.

(c) In the event that the Purchaser fails to provide the annual forecast in the form and content required by DOE, DOE may, in its sole discretion, require a rescheduling of any delivery commitment schedule then in effect.

2. *Preparation for Transportation.*

(a) The Purchaser shall arrange for, and provide, all preparation, packaging, required inspections, and loading activities necessary for the transportation of SNF and/or HLW to the DOE facility. The Purchaser shall notify DOE of such activities sixty (60) days prior to the commencement of such activities. The preparatory activities by the Purchaser shall be made in accordance with all applicable laws and regulations relating to the Purchaser's responsibilities hereunder. DOE may designate a representative to observe the

preparatory activities conducted by the Purchaser at the Purchaser's site, and the Purchaser shall afford access to such representative.

(b) Except as otherwise agreed to by DOE, the Purchaser shall advise DOE, in writing as specified in appendix F, annexed hereto and made a part hereof, as to the description of the material in each shipping lot sixty (60) days prior to scheduled DOE transportation of that shipping lot.

(c) The Purchaser shall be responsible for incidental maintenance, protection and preservation of any and all shipping casks furnished to the Purchaser by DOE for the performance of this contract. The Purchaser shall be liable for any loss of or damage to such DOE-furnished property, and for expenses incidental to such loss or damage while such casks are in the possession and control of the Purchaser except as otherwise provided for hereunder. Routine cask maintenance, such as scheduled overhauls, shall not be the responsibility of the Purchaser.

B. DOE Responsibilities

1. DOE shall accept title to all SNF and/or HLW, of domestic origin, generated by the civilian nuclear power reactor(s) specified in appendix A, provide subsequent transportation for such material to the DOE facility, and dispose of such material in accordance with the terms of this contract.

2. DOE shall arrange for, and provide, a cask(s) and all necessary transportation of the SNF and/or HLW from the Purchaser's site to the DOE facility. Such cask(s) shall

be suitable for use at the Purchaser's site, meet applicable regulatory requirements, and be accompanied by pertinent information including, but not limited to, the following:

(a) Written procedures for cask handling and loading, including specifications on Purchaser-furnished cannisters for containment of failed fuel;

(b) Training for Purchaser's personnel in cask handling and loading, as may be necessary;

(c) Technical information, special tools, equipment, lifting trunnions, spare parts and consumables needed to use and perform incidental maintenance on the cask(s); and

(d) Sufficient documentation on the equipment supplied by DOE.

3. DOE may fulfill any of its obligations, or take any action, under this contract either directly or through contractors.

4. DOE shall annually provide to the Purchaser pertinent information on the waste disposal program including information on cost projections, project plans and progress reports.

5. (a) Beginning on April 1, 1991, DOE shall issue an annual acceptance priority ranking for receipt of SNF and/or HLW at the DOE repository. This priority ranking shall be based on the age of SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. The oldest fuel or waste will have the highest priority for acceptance, except as provided in paragraphs B and D of Article V and paragraph B.3 of Article VI hereof.

(b) Beginning not later than July 1, 1987, DOE shall issue an annual capacity report for planning purposes. This report shall set forth the projected annual receiving capacity for the DOE facility(ies) and the annual acceptance ranking relating to DOE contracts for the disposal of SNF and/or HLW including, to the extent available, capacity information for ten (10) years following the projected commencement of operation of the initial DOE facility.

ARTICLE V—DELIVERY OF SNF AND/OR HLW

A. Description of SNF and HLW

The Purchaser shall deliver to DOE and DOE shall, as provided in this contract, accept the SNF and/or HLW which is described in accordance with Article VI.A. of this contract, for disposal thereof.

B. Delivery Commitment Schedule

1. Delivery commitment schedule(s), in the form set forth in appendix C annexed hereto and made a part hereof, for delivery of SNF and/or HLW shall be furnished to DOE by Purchaser. After DOE has issued its proposed acceptance priority ranking, as described in paragraph B.5 of Article IV hereof, beginning January 1, 1992 the Purchaser shall submit to DOE the delivery commitment schedule(s) which shall identify all SNF and/or HLW the Purchaser wishes to deliver to DOE beginning sixty-three (63) months thereafter. DOE shall approve or disapprove such schedules within three (3) months after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and

request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval.

2. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s). Purchaser shall have the right to adjust the quantities of SNF and/or HLW plus or minus (±) twenty percent (20%), and the delivery schedule up to two (2) months, until the submission of the final delivery schedule.

C. Final Delivery Schedule

Final delivery schedule(s), in the form set forth in appendix D, annexed hereto and made a part hereof, for delivery of SNF and/or HLW covered by an approved delivery commitment schedule(s) shall be furnished to DOE by Purchaser. The Purchaser shall submit to DOE final delivery schedules not less than twelve (12) months prior to the delivery date specified therein. DOE shall approve or disapprove a final delivery schedule within forty-five (45) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser

in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s).

D. Emergency Deliveries

Emergency deliveries of SNF and/or HLW may be accepted by DOE before the date provided in the delivery commitment schedule upon prior written approval by DOE.

E. Exchanges

Purchaser shall have the right to determine which SNF and/or HLW is delivered to DOE; *provided, however,* that Purchaser shall comply with the requirements of this contract. Purchaser shall have the right to exchange approved delivery commitment schedules with parties to other contracts with DOE for disposal of SNF and/or HLW; *provided, however,* that DOE shall, in advance, have the right to approve or disapprove, in its sole discretion, any such exchanges. Not less than six (6) months prior to the delivery date specified in the Purchaser's approved delivery commitment schedule, the Purchaser shall submit to DOE an exchange request, which states the priority rankings of both the Purchaser hereunder and any other Purchaser with whom the exchange of approved delivery commitment schedules is proposed. DOE shall approve or disapprove the proposed exchange within thirty (30) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval.

ARTICLE VI—CRITERIA FOR DISPOSAL

A. General Requirements

1. *Criteria.*

(a) Except as otherwise provided in this contract, DOE shall accept hereunder only such SNF and/or HLW which meets the General Specifications for such fuel and waste as set forth in appendix E, annexed hereto and made a part hereof.

(b) Purchaser shall accurately classify SNF and/or HLW prior to delivery in accordance with paragraphs B and D of appendix E.

2. *Procedures.*

(a) Purchaser shall provide to DOE a detailed description of the SNF and/or HLW to be delivered hereunder in the form and content as set forth in appendix F, annexed hereto and made a part hereof. Purchaser shall promptly advise DOE of nay changes in said SNF and/or HLW as soon as they become known to the purchaser.

(b) DOE's obligation for disposing of SNF under this contract also extends to other than standard fuel; however, for any SNF which has been designated by the Purchaser as other than standard fuel, as that term is defined in appendix E, the Purchaser shall obtain delivery and procedure confirmation from DOE prior to delivery. DOE shall advise Purchaser within sixty (60) days after receipt of such confirmation request as to the technical feasibility of disposing of such fuel on the currently agreed to schedule and any schedule adjustment for such services.

B. Acceptance Procedures

1. *Acceptance Priority Ranking.*

Delivery commitment schedules for SNF and/or HLW may require the disposal or more material than the annual capacity of the DOE disposal facility (or facilities) can accommodate. The following acceptance priority ranking will be utilized:

(a) Except as may be provided for in subparagraph (b) below and Article V.D. of this contract, acceptance priority shall be based upon the age of the SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. DOE will first accept from Purchaser the oldest SNF and/or HLW for disposal in the DOE facility, except as otherwise provided for in paragraphs B and D of Article V.

(b) Notwithstanding the age of the SNF and/or HLW, priority may be accorded any SNF and/or HLW removed from a civilian nuclear power reactor that has reached the end of its useful life or has been shut down permanently for whatever reason.

2. *Verification of SNF and/or HLW.*

During cask loading and prior to acceptance by DOE for transportation to the DOE facility, the SNF and/or HLW description of the shipping lot shall be subject to verification by DOE. To the extent the SNF and/or HLW is consistent with the description submitted and approved, in accordance with appendices E and F, DOE agrees to accept such SNF and/or HLW for disposal when DOE has verified the SNF and/or HLW description, determined the material is properly loaded, packaged, marked, labeled and ready for transportation, and has taken custody, as

evidenced in writing, of the material at the Purchaser's site, f.o.b. carrier. A properly executed off-site radioactive shipment record describing cask contents must be prepared by the Purchaser along with a signed certification which states: "This is to certify that the above-named materials are properly described, classified, packaged, marked and labeled and are in proper condition for transfer according to the applicable regulations of the U. S. Department of Transportation."

3. *Improperly described SNF and/or HLW.*

(a) *Prior to Acceptance*— If SNF and/or HLW is determined by DOE to be improperly described prior to acceptance by DOE at the Purchaser's site, DOE shall promptly notify the Purchaser in writing of such determination. DOE reserves the right, in its sole discretion, to refuse to accept such SNF and/or HLW until the SNF and/or HLW has been properly described. The Purchaser shall not transfer such SNF and/or HLW to DOE unless DOE agrees to accept such SNF and/or HLW under such other arrangements as may be agreed to, in writing, by the parties.

(b) *After Acceptance*— If subsequent to its acceptance DOE finds that such SNF and/or HLW is improperly described, DOE shall promptly notify the Purchaser, in writing, of such finding. In the event of such notification, Purchaser shall provide DOE with a proper designation within thirty (30) days. In the event of a failure by the Purchaser to provide such proper designation, DOE may hold in abeyance any and all deliveries scheduled hereunder.

ARTICLE VII—TITLE

Title to all SNF and/or HLW accepted by DOE for disposal shall pass to DOE at the Purchaser's site as provided for in Article VI hereof. DOE shall be solely repsonsible for control of all material upon passage of title. DOE shall have the right to dispose as it sees fit of any SNF and/or HLW to which it has taken title. The Purchaser shall have no claim against DOE or the Government with respect to such SNF or HLW nor shall DOE or the Government be obligated to compensate the Purchaser for such material.

ARTICLE VIII—FEES AND TERMS OF PAYMENT

A. Fees

1. Effective April 7, 1983, Purchaser shall be charged a fee in the amount of 1.0 mill per kilowatt hour (1M/kWh) electricity generated and sold.

2. For SNF, or solidified high-level radioactive waste derived from SNF, which fuel was used to generate electricity in a civilian nuclear power reactor prior to April 7, 1983, a one-time fee will be assessed by applying industry-wide average dollar per kilogram charges to four (4) distinct ranges of fuel burnup so that the integrated cost across all discharged (i.e. spent) fuel is equivalent to an industry-wide average charge of 1.0 mill per kilowatt-hour. For purposes of this contract, discharged nuclear fuel is that fuel removed from the reactor core with no plans for reinsertion. In the event that any such fuel withdrawn with plans for reinsertion is not reinserted, then the applicable fee for such fuel shall be calculated as set

forth in this paragraph 2. The categories of spent nuclear fuel burnup and the fee schedule are listed below:

[In 1982 dollars]

Nuclear spent fuel burnup range	Dollars per kilogram
0 to 5,000 MWDT/MTU	$80.00
5,000 to 10,000 MWDT/MTU	142.00
10,000 to 20,000 MWDT/MTU	162.00
Over 20,000 MWDT/MTU	184.00

This fee shall not be subject to adjustment, and the payment thereof by the Purchaser shall be made to DOE as specified in paragraph B of this Article VIII.

3. For in-core fuel as of April 7, 1983, that portion of the fuel burned through April 6, 1983 shall be subject to the one-time fee as calculated in accordance with the following methodology: [a] determine the total weight in kilograms of unranium loaded initially in the particular core; [b] determine the total megawatt-days (thermal) which have been generated by all of the fuel assemblies in the said core as of 12:00 A.M. April 7, 1983; [c] divide the megawatt-days (thermal) generated in the said core by the total metric tons of initially loaded uranium in that core and multiply the quotient by the conversion factor 0.0078 to obtain a value in dollars per kilogram; and [d] multiply the

dollars per kilogram value by the kilograms determined in [a] above to derive the dollar charge for the one-time fee to be paid for the specified in-core fuel as of 12:00 A.M. April 7, 1983. For purposes of this contract, in-core fuel is that fuel in the reactor core as of the date specified, plus any fuel removed from the reactor with plans for reinsertion. That portion of such fuel unburned as of 12:00 A.M. April 7, 1983 shall be subject to the 1.0 mill per kilowatt-hour charge.

4. DOE will annually review the adequacy of the fees and adjust the 1M/KWH fee, if necessary, in order to assure full cost recovery by the Government. Any proposed adjustment to the said fee will be transmitted to Congress and shall be effective after a period of ninety (90) days of continuous session has elapsed following receipt of such transmittal unless either House of Congress adopts a resolution disapproving the proposed adjustment. Any adjustment to the 1M/KWH fee under paragraph A.1. of this Article VIII shall be prospective.

B. Payment

1. For electricity generated and sold by the Purchaser's civilian nuclear power reactor(s) on or after April 7, 1983, fees shall be paid quarterly by the Purchaser and must be received by DOE not later than the close of the last business day of the month following the end of each assigned 3-month period. The first payment shall be due on July 31, 1983, for the period April 7, 1983, to June 30, 1983. (Add as applicable: A one-time adjustment period payment shall be due on _____, for the period _____ to _____.) The assigned 3-month period, for purposes of payment

and reporting of electricity generated and sold shall begin _____.

2. For SNF discharged prior to April 7, 1983, and for in-core burned fuel as of 12:00 A.M. April 7, 1983, the Purchaser shall, within two (2) years of contract execution, select one of the following fee payment options:

(a) *Option 1*— The Purchaser's financial obligation for said fuel shall be prorated evenly over forty (40) quarters and will consist of the fee plus interest on the outstanding fee balance. The interest from April 7, 1983, to date of the first payment is to be calculated based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period. Beginning with the first payment, interest is to be calculated on Purchaser's financial obligation plus accrued interest, at the ten-year Treasury note rate in effect on the date of the first payment. In no event shall the end of the forty (40) quarters extend beyond the first scheduled delivery date as reflected in the DOE-approved delivery commitment schedule. All payments shall be made concurrently with the assigned three month period payments. At any time prior to the end of the forty (40) quarters, Purchaser may, without penalty, make a full or partial lump sum payment at any of the assigned three month period payment dates. Subsequent quarterly payments will be appropriately reduced to reflect the reduction in the remaining balance in the fee due and payable. The remaining financial obligation, if any, will be subject

to interest at the same ten-year Treasury note rate over the remainder of the ten year period.

(b) *Option 2*— The Purchaser's financial obligation shall be paid in the form of a single payment anytime prior to the first delivery, as reflected in the DOE approved delivery commitment schedule, and shall consist of the fee plus interest on the outstanding fee balance. Interest is to be calculated from April 7, 1983, to the date of the payment based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period until payment.

(c) *Option 3*— The Purchaser's financial obligation shall be paid prior to June 30, 1985, or prior to two (2) years after contract execution, whichever comes later, in the form of a single payment and shall consist of all outstanding fees for SNF and in-core fuel burned prior to April 7, 1983. Under this option, no interest shall be due to DOE from April 7, 1983, to the date of full payment on the outstanding fee balance.

3. Method of Payment:

(a) Payments shall be made by wire transfer, in accordance with instructions specified by DOE in appendix G attached hereto and made a part hereof, and must be received within the time periods specified in paragraph B.1. of this Article VIII.

(b) The Purchaser will complete a Standard Remittance Advice, as set forth in appendix G, for each assigned three month period payment, and mail it postmarked no later than the last business day of the month following each assigned three month period to

Department of Energy, Office of Controller, Cash Management Division, Box 500, Room D–208, Germantown, Maryland 20874.

4. Any fees not paid on a timely basis or underpaid because of miscalculation will be subject to interest as specified in paragraph C of this Article VIII.

C. Interest on Late Fees

1. DOE will notify the Purchaser of amounts due only when unpaid or underpaid by the dates specified in paragraph B above. Interest will be levied according to the following formula:

Interest=Unpaid balance due to DOE for assigned three month period × Quarterly Treasury rate plus six percent (6%) × Number of months late including month of payment (fractions rounded up to whole months) ÷ 12

2. Interest is payable at any time prior to the due date for the subsequent assigned three month period fee payment. Nonpayment by the end of the subsequent assigned three month period will result in compounding of interest due. Purchaser shall complete a Standard Remittance Advice of interest payments.

3. Following the assessment of a late fee by DOE, payments will be applied against accrued interest first and the principal thereafter.

D. Effect of Payment

Upon payment of all applicable fees, interest and penalties on upaid or underpaid amounts, the Purchaser shall have no further financial obligation to DOE for the disposal of the accepted SNF and/or HLW.

E. Audit

1. The DOE or its representative shall have the right to perform any audits or inspections necessary to determine whether Purchaser is paying the correct amount under the fee schedule and interest provisions set forth in paragraphs A, B and C above.

2. Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

3. The Purchaser shall furnish DOE with such records, reports and data as may be necessary for the determination of quantities delivered hereunder and for final settlement of amounts due under this contract and shall retain and make available to DOE and its authorized representative examination at all reasonable times such records, reports and data for a period of three (3) years from the completion of delivery of all material under this contract.

ARTICLE IX—DELAYS

A. Unavoidable Delays by Purchaser or DOE

Neither the Government nor the Purchaser shall be liable under this contract for damages caused by

failure to perform its obligations hereunder, if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform. In the event circumstances beyond the reasonable control of the Purchaser or DOE—such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather—cause delay in scheduled delivery, acceptance or transport of SNF and/or HLW, the party experiencing the delay will notify the other party as soon as possible after such delay is ascertained and the parties will readjust their schedules, as appropriate, to accommodate such delay.

B. Avoidable Delays by Purchaser or DOE

In the event of any delay in the delivery, acceptance or transport of SNF and/or HLW to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

ARTICLE X—SUSPENSION

A. In addition to any other rights DOE may have hereunder, DOE reserves the right, at no cost to the Government, to suspend this contract or any portion thereof upon written notice to the Purchaser within ninety (90) days of the Purchaser's failure to perform its obligations hereunder, and the Purchaser's failure

to take corrective action within thirty (30) days after written notice of such failure to perform as provided above, unless such failure shall arise from causes beyond the control and without the fault or negligence of the Purchaser, its contractors or agents. However, the Purchaser's obligation to pay fees required hereunder shall continue unaffected by any suspension. Any such suspension shall be rescinded if and when DOE determines that Purchaser has completed corrective action.

B. The DOE reserves the right to suspend any scheduled deliveries in the event that a national emergency requires that priority be given to Government programs to the exclusion of the work under this contract. In the event of such a suspension by the Government, the DOE shall refund that portion of payments representing services not delivered as determined by the Contracting Officer to be an equitable adjustment. Any disagreement arising from the refund payment, if any, shall be resolved as provided in the clause of this contract, entitled "DISPUTES."

ARTICLE XI—REMEDIES

Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law.

ARTICLE XII—NOTICES

All notices and communications between the parties under this contract (except notices published in

the FEDERAL REGISTER) shall be in writing and shall be sent to the following addressees:

To DOE: _____

_____

_____

To the Purchaser: _____

_____

_____

However, the parties may change the addresses or addressees for such notices or communications without formal modification to this contract; *provided, however,* that notice of such changes shall be given by registered mail.

ARTICLE XIII—REPRESENTATION CONCERNING NUCLEAR HAZARDS INDEMNITY

A. DOE represents that it will include in its contract(s) for the operation of any DOE facility an indemnity agreement based upon Section 170(d) of the Atomic Energy Act of 1954, as amended, a copy of which agreement shall be furnished to the Purchaser; that under said agreement, DOE shall have agreed to indemnify the contractor and other persons indemnified against claims for public liability (as defined in said Act) arising out of or in connection with contractual activities; that the indemnity shall apply to covered nuclear incidents which (1) take place at a contract location; or (2) arise out of or in the course of transportation of source, special nuclear or by-product material to or from a contract location. The obligation

of DOE to indemnify shall be subject to the conditions stated in the indemnity agreement.

B. The provisions of this Article XIII shall continue beyond the term of this contract.

ARTICLE XIV—ASSIGNMENT

The rights and duties of the Purchaser may be assignable with transfer of title to the SNF and/or HLW involved; *provided, however,* that notice of any such transfer shall be made to DOE within ninety (90) days of transfer.

ARTICLE XV—AMENDMENTS

The provisions of this contract has been developed in the light of uncertainties necessarily attendant upon long-term contracts. Accordingly, at the request of either DOE or Purchaser, the parties will negotiate and, to the extent mutually agreed, amend this contract as the parties may deem to be necessary or proper to reflect their respective interests; *provided, however,* that any such amendment shall be consistent with the DOE final rule published in the FEDERAL REGISTER on April 18, 1983 entitled, "Standard Contract for Disposal or SNF and/or HLW", as the same may be amended from time to time.

ARTICLE XVI—DISPUTES

A. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall

reduce his decision to writing and mail or otherwise furnish a copy thereof to the Purchaser. The decision of the Contracting Officer shall be final and conclusive unless within ninety (90) days from the date of receipt of such copy, the Purchaser mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the DOE Board of Contract Appeals (Board). The decision of the Board shall be final and conclusive unless determined by a court of competent jursidiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Purchaser shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

B. For Purchaser claims of more than $50,000, the Purchaser shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the Purchaser's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable. The certification shall be executed by the Purchaser if an individual. When the Purchaser is not an individual, the certification shall be executed by a senior company official in charge at the Purchaser's plant or location involved, or by an officer or general partner of the Purchaser having overall responsibility for the conduct of the Purchaser's affairs.

C. For Purchaser claims of $50,000 or less, the Contracting Officer must render a decision within sixty (60) days. For Purchaser claims in excess of

$50,000, the Contracting Officer must decide the claim within sixty (60) days or notify the Purchaser of the date when the decision will be made.

D. This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph A above; *provided, however,* that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

ARTICLE XVII—OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE XVIII—COVENANT AGAINST CONTINGENT FEES

The Purchaser warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Purchaser for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to increase the contract price or

consideration, or otherwise recover, the full amount of such commission, brokerage, or contingent fee.

ARTICLE XIX—EXAMINATION OF RECORDS

The Purchaser agrees that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Purchaser involving transactions related to this contract until the expiration of three years after final payment under this contract.

ARTICLE XX—PERMITS

The Government and the Purchaser shall procure all necessary permits or licenses (including any special nuclear material licenses) and comply with all applicable laws and regulations of the United States, States and municipalities necessary to execute their respective responsibilities and obligations under this contract.

ARTICLE XXI—RIGHTS IN TECHNICAL DATA

A. Definitions.

1. *Technical data* means recorded information regardless of form or characteristic, of a specific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain or operate material. The

data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design-type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein do not include financial reports, cost analyses, and other information incidental to contract administration.

2. *Proprietary data* means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(a) Are not generally known or available from other sources without obligation concerning their confidentiality;

(b) Have not been made available by the owner to others without obligation concerning its confidentiality; and

(c) Are not already available to the Government without obligation concerning their confidentiality.

3. *Contract data* means technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, or technical data actually delivered in connection with the contract.

4. *Unlimited rights* means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

B. Allocation of Rights.

1. The Government shall have:

(a) Unlimited rights in contract data except as otherwise provided below with respect to proprietary data properly marked as authorized by this clause;

(b) The right to remove, cancel, correct or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if in response to a written inquiry by DOE concerning the proprietary nature of the markings, the Purchaser fails to respond thereto within 60 days or fails to substantiate the proprietary nature of the markings. In either case, DOE will notify the Purchaser of the action taken;

(c) No rights under this contract in any technical data which are not contract data.

2. Subject to the foregoing provisions of this rights in technical data clause, the Purchaser shall have the right to mark proprietary data it furnishes under the contract with the following legend and no other, the terms of which shall be binding on the Government:

LIMITED RIGHTS LEGEND

This "proprietary data," furnished under "Contract No. ___" with the U.S. Department of Energy may be duplicated and used by the Government with the express limitations that the "proprietary data" may

not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Purchaser, except that further disclosure or use may be made solely for the following purposes:

(a) This "proprietary data" may be disclosed for evaluation purposes under the restriction that the "proprietary data" be retained in confidence and not be further disclosed;

(b) This "proprietary data" may be disclosed to contractors participating in the Government's program of which this contract is a part, for information or use in connection with the work performed under their contracts and under the restriction that the "proprietary data" be retained in confidence and not be further disclosed; or

(c) This "proprietary data" may be used by the Government or others on its behalf for emergency work under the restriction that the "proprietary data" be retained in confidence and not be further disclosed. This legend shall be marked on any reproduction of this data in whole or in part.

3. In the event that proprietary data of a third party, with respect to which the Purchaser is subject to restrictions on use or disclosure, is furnished with the Limited Rights Legend above, Purchaser shall secure the agreement of such third party to the rights of the Government as set forth in the Limited Rights Legend. DOE shall upon request furnish the names of those contractors to which proprietary data has been disclosed.

ARTICLE XXII—ENTIRE CONTRACT

A. This contract, which consists of Articles I through XXII and appendices A through G, annexed hereto and made a part hereof, contains the entire agreement between the parties with respect to the subject matter hereof. Any representation, promise, or condition not incorporated in this contract shall not be binding on either party. No course of dealing or usage of trade or course of performance shall be relevant to explain or supplement any provision contained in this contract.

B. Nothing in this contract is intended to affect in any way the contractual obligation of any other persons with whom the Purchaser may have contracted with respect to assuming some or all disposal costs or to accept title to SNF and/or HLW.

* * *

APPENDIX J

MICHIGAN PUBLIC SERVICE COMMISSION

Act 3 of 1939

AN ACT to provide for the regulation and control of public and certain private utilities and other services affected with a public interest within this state; to provide for alternative energy suppliers; to provide for licensing; to include municipally owned utilities and other providers of energy under certain provisions of this act; to create a public service commission and to prescribe and define its powers and duties; to abolish the Michigan public utilities commission and to confer the powers and duties vested by law on the public service commission; to provide for the continuance, transfer, and completion of certain matters and proceedings; to abolish automatic adjustment clauses; to prohibit certain rate increases without notice and hearing; to qualify residential energy conservation programs permitted under state law for certain federal exemption; to create a fund; to provide for a restructuring of the manner in which energy is provided in this state; to encourage the utilization of resource recovery facilities; to prohibit certain acts and practices of providers of energy; to allow for the securitization of stranded costs; to reduce rates; to provide for appeals; to provide appropriations; to declare the effect and purpose of this act; to prescribe remedies and penalties; and to repeal acts and parts of acts.

MICHIGAN PUBLIC SERVICE COMMISSION (EXCERPT) Act 3 of 1939

460.6 Public service commission; power and jurisdiction; "private, investor-owned wastewater utilities" defined.

Sec. 6. (1) The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, oil, gas, and pipeline companies; motor carriers; private wastewater treatment facilities; and all public transportation and communication agencies other than railroads and railroad companies.

(2) A private, investor-owned wastewater utility may apply to the commission for rate regulation. If an application is filed under this subsection, the commission is vested with the specific grant of jurisdictional authority to regulate the rates, fares,

fees, and charges of private, investor-owned wastewater utilities. As used in this subsection, "private, investor-owned wastewater utilities" means a utility that delivers wastewater treatment services through a sewage system and the physical assets of which are wholly owned by an individual or group of individual shareholders.

460.6a Gas or electric utility; petition or application to increase rates and charges or to amend rate or rate schedules; notice and hearing; finding and order granting partial and immediate relief; investigation and report; increase in rates based upon changes in cost of fuel or purchased gas; automatic fuel or purchased gas adjustment clause; rules and procedures; adjustment clauses operating without notice and hearing abolished; separate hearing to determine cost of fuel, purchased gas, or purchased power; recovery of cost; "full and complete hearing" and "general rate case" defined; final decision; reports.

Sec. 6a. (1) When a finding or order is sought by a gas or electric utility to increase its rates and charges or to alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected. The utility shall place in evidence facts relied upon to support the utility's petition or application to increase its rates and charges, or to alter, change, or amend any rate or rate schedules. After first having given notice to the interested parties within the service area to be affected and affording interested parties a reasonable

opportunity for a full and complete hearing, the commission, after submission of all proofs by any interested party, may in its discretion and upon written motion by the utility make a finding and enter an order granting partial and immediate relief. A finding or order shall not be authorized or approved ex parte, nor until the commission's technical staff has made an investigation and report. An alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the cost of service to its customers may be authorized and approved without notice or hearing. There shall be no increase in rates based upon changes in cost of fuel or purchased gas unless notice has been given within the service area to be affected, and there has been an opportunity for a full and complete hearing on the cost of fuel or purchased gas. The rates charged by any utility pursuant to an automatic fuel or purchased gas adjustment clause shall not be altered, changed, or amended unless notice has been given within the service area to be affected, and there has been an opportunity for a full and complete hearing on the cost of the fuel or purchased gas.

(2) The commission shall adopt rules and procedures for the filing, investigation, and hearing of petitions or applications to increase or decrease utility rates and charges as the commission finds necessary or appropriate to enable it to reach a final decision with respect to petitions or applications within a period of 9 months from the filing of the petitions or applications. The commission shall not authorize or approve adjustment clauses that operate without notice and an opportunity for a full and complete hearing, and all such clauses shall be abolished. The

commission may hold a full and complete hearing to determine the cost of fuel, purchased gas, or purchased power separately from a full and complete hearing on general rate case and may be held concurrently with the general rate case. The commission shall authorize a utility to recover the cost of fuel, purchased gas, or purchased power only to the extent that the purchases are reasonable and prudent. As used in this section:

(a) "Full and complete hearing" means a hearing that provides interested parties a reasonable opportunity to present and cross-examine evidence and present arguments relevant to the specific element or elements of the request that are the subject of the hearing.

(b) "General rate case" means a proceeding initiated by a utility in an application filed with the commission that alleges a revenue deficiency and requests an increase in the schedule of rates or charges based on the utility's total cost of providing service.

(3) If a final decision has not been reached upon a petition or application to increase or decrease utility rates within the 9-month period required by subsection (2), the commission shall give priority to the case and shall take such other action as it finds necessary or appropriate to expedite a final decision. If the commission fails to reach a final decision with respect to a petition or application to increase or decrease utility rates within the 9-month period following the filing of the petition or application, the commission, within 15 days after expiration of the 9-month period, shall submit a written report to the governor and to the president of the senate and the speaker of the house of representatives stating the reasons a decision

was not reached within the 9-month period and the actions being taken to expedite the decision. The commission shall submit a further report upon reaching a final decision providing full details with respect to the conduct of the case, including the time required for issuance of the commission's decision following the conclusion of hearings.

460.6j Incorporation of power supply cost recovery clause in electric rates or rate schedule of utility; definitions; order and hearing; filing power supply cost recovery plan and 5-year forecast; power supply and cost review; final or temporary order; incorporating power supply cost recovery factors in rates; filing revised power supply cost recovery plan; reopening power supply and cost review; monthly statement of revenues; power supply cost reconciliation; commission order; refunds or credits or additional charges to customers; apportionment; interest; exemption; setting power supply cost recovery factors in general rate case order.

Sec. 6j. (1) As used in this act:

(a) "Power supply cost recovery clause" means a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices.

(b) "Power supply cost recovery factor" means that element of the rates to be charged for electric service to reflect power supply costs incurred by an electric utility and made pursuant to a power supply cost recovery clause incorporated in the rates or rate schedule of an electric utility.

(2) Pursuant to its authority under this act, the public service commission may incorporate a power supply cost recovery clause in the electric rates or rate schedule of a utility, but is not required to do so. Any order incorporating a power supply cost recovery clause shall be as a result of a hearing solely on the question of the inclusion of the clause in the rates or rate schedule, which hearing shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.271 to 24.287 of the Michigan Compiled Laws, or, pursuant to subsection (18), as a result of a general rate case. Any order incorporating a power supply cost recovery clause shall replace and rescind any previous fuel cost adjustment clause or purchased and net interchanged power adjustment clause incorporated in the electric rates of the utility upon the effective date of the first power supply cost recovery factor authorized for the utility under its power supply cost recovery clause.

(3) In order to implement the power supply cost recovery clause established pursuant to subsection (2), a utility annually shall file, pursuant to procedures established by the commission, if any, a complete power supply cost recovery plan describing the expected sources of electric power supply and changes in the cost of power supply anticipated over a future

12-month period specified by the commission and requesting for each of those 12 months a specific power supply cost recovery factor. The plan shall be filed not less than 3 months before the beginning of the 12-month period covered by the plan. The plan shall describe all major contracts and power supply arrangements entered into by the utility for providing power supply during the specified 12-month period. The description of the major contracts and arrangements shall include the price of fuel, the duration of the contract or arrangement, and an explanation or description of any other term or provision as required by the commission. The plan shall also include the utility's evaluation of the reasonableness and prudence of its decisions to provide power supply in the manner described in the plan, in light of its existing sources of electrical generation, and an explanation of the actions taken by the utility to minimize the cost of fuel to the utility.

(4) In order to implement the power supply cost recovery clause established pursuant to subsection (2), a utility shall file, contemporaneously with the power supply cost recovery plan required by subsection (3), a 5-year forecast of the power supply requirements of its customers, its anticipated sources of supply, and projections of power supply costs, in light of its existing sources of electrical generation and sources of electrical generation under construction. The forecast shall include a description of all relevant major contracts and power supply arrangements entered into or contemplated by the utility, and such other information as the commission may require.

(5) If a utility files a power supply cost recovery plan and a 5-year forecast as provided in subsections (3) and (4), the commission shall conduct a proceeding, to be known as a power supply and cost review, for the purpose of evaluating the reasonableness and prudence of the power supply cost recovery plan filed by a utility pursuant to subsection (3), and establishing the power supply cost recovery factors to implement a power supply cost recovery clause incorporated in the electric rates or rate schedule of the utility. The power supply and cost review shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969.

(6) In its final order in a power supply and cost review, the commission shall evaluate the reasonableness and prudence of the decisions underlying the power supply cost recovery plan filed by the utility pursuant to subsection (3), and shall approve, disapprove, or amend the power supply cost recovery plan accordingly. In evaluating the decisions underlying the power supply cost recovery plan, the commission shall consider the cost and availability of the electrical generation available to the utility; the cost of short-term firm purchases available to the utility; the availability of interruptible service; the ability of the utility to reduce or to eliminate any firm sales to out-of-state customers if the utility is not a multi-state utility whose firm sales are subject to other regulatory authority; whether the utility has taken all appropriate actions to minimize the cost of fuel; and other relevant factors. The commission shall approve, reject, or amend the 12 monthly power supply cost recovery factors requested by the utility in its power

supply cost recovery plan. The factors shall not reflect items the commission could reasonably anticipate would be disallowed under subsection (13). The factors ordered shall be described in fixed dollar amounts per unit of electricity, but may include specific amounts contingent on future events.

(7) In its final order in a power supply and cost review, the commission shall evaluate the decisions underlying the 5-year forecast filed by a utility pursuant to subsection (4). The commission may also indicate any cost items in the 5-year forecast that, on the basis of present evidence, the commission would be unlikely to permit the utility to recover from its customers in rates, rate schedules, or power supply cost recovery factors established in the future.

(8) The commission, on its own motion or the motion of any party, may make a finding and enter a temporary order granting approval or partial approval of a power supply cost recovery plan in a power supply and cost recovery review, after first having given notice to the parties to the review, and after having afforded to the parties to the review a reasonable opportunity for a full and complete hearing. A temporary order made pursuant to this subsection shall be considered a final order for purposes of judicial review.

(9) If the commission has made a final or temporary order in a power supply and cost review, the utility may each month incorporate in its rates for the period covered by the order any amounts up to the power supply cost recovery factors permitted in that order. If the commission has not made a final or temporary

order within 3 months of the submission of a complete power supply cost recovery plan, or by the beginning of the period covered in the plan, whichever comes later, or if a temporary order has expired without being extended or replaced, then pending an order which determines the power supply cost recovery factors, a utility may each month adjust its rates to incorporate all or a part of the power supply cost recovery factors requested in its plan. Any amounts collected under the power supply cost recovery factors before the commission makes its final order shall be subject to prompt refund with interest to the extent that the total amounts collected exceed the total amounts determined in the commission's final order to be reasonable and prudent for the same period of time.

(10) Not less than 3 months before the beginning of the third quarter of the 12-month period, the utility may file a revised power supply cost recovery plan which shall cover the remainder of the 12-month period. Upon receipt of the revised power supply cost recovery plan, the commission shall reopen the power supply and cost review. In addition, the commission may reopen the power supply and cost review on its own motion or on the showing of good cause by any party if at least 6 months have elapsed since the utility submitted its complete filing and if there are at least 60 days remaining in the 12-month period under consideration. A reopened power supply and cost review shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, and in accordance with subsections (3), (6), (8), and (9).

(11) Not more than 45 days following the last day of each billing month in which a power supply cost recovery factor has been applied to customers' bills, the utility shall file with the commission a detailed statement for that month of the revenues recorded pursuant to the power supply cost recovery factor and the allowance for cost of power supply included in the base rates established in the latest commission order for the utility, and the cost of power supply. The detailed statement shall be in the manner and form prescribed by the commission. The commission shall establish procedures for insuring that the detailed statement is promptly verified and corrected if necessary.

(12) Not less than once a year, and not later than 3 months after the end of the 12-month period covered by a utility's power supply cost recovery plan, the commission shall commence a proceeding, to be known as a power supply cost reconciliation, as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969. Reasonable discovery shall be permitted before and during the reconciliation proceeding in order to assist parties and interested persons in obtaining evidence concerning reconciliation issues including, but not limited to, the reasonableness and prudence of expenditures and the amounts collected pursuant to the clause. At the power supply cost reconciliation the commission shall reconcile the revenues recorded pursuant to the power supply cost recovery factors and the allowance for cost of power supply included in the base rates established in the latest commission order for the utility with the amounts actually expensed and included in the cost of

power supply by the utility. The commission shall consider any issue regarding the reasonableness and prudence of expenses for which customers were charged if the issue was not considered adequately at a previously conducted power supply and cost review.

(13) In its order in a power supply cost reconciliation, the commission shall:

(a) Disallow cost increases resulting from changes in accounting or rate-making expense treatment not previously approved by the commission. The commission may order the utility to pay a penalty not to exceed 25% of the amount improperly collected. Costs incurred by the utility for penalty payments shall not be charged to customers.

(b) Disallow any capacity charges associated with power purchased for periods in excess of 6 months unless the utility has obtained the prior approval of the commission. If the commission has approved capacity charges in a contract with a qualifying facility, as defined by the federal energy regulatory commission pursuant to the public utilities regulatory policies act of 1978, Public Law 95-617, 92 Stat. 3117, the commission shall not disallow the capacity charges for the facility in the power supply cost reconciliation unless the commission has ordered revised capacity charges upon reconsideration pursuant to this subsection. A contract shall be valid and binding in accordance with its terms and capacity charges paid pursuant to such a contract shall be recoverable costs of the utility for rate-making purposes notwithstanding that the order approving such a contract is later vacated, modified, or otherwise held to be invalid in whole or in part if the order approving the contract has not been stayed or suspended by a

competent court within 30 days after the date of the order, or within 30 days of the effective date of the 1987 amendatory act that added subsection (19) if the order was issued after September 1, 1986, and before the effective date of the 1987 amendatory act that added subsection (19). The scope and manner of the review of capacity charges for a qualifying facility shall be determined by the commission. Except as to approvals for qualifying facilities granted by the commission prior to June 1, 1987, proceedings before the commission seeking such approvals shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969. The commission, upon its own motion or upon application of any person, may reconsider its approval of capacity charges in a contested case hearing after passage of a period necessary for financing the qualifying facility, provided that:

(i) The commission has first issued an order making a finding based on evidence presented in a contested case that there has been a substantial change in circumstances since the commission's initial approval; and

(ii) Such a commission finding shall be set forth in a commission order subject to immediate judicial review.

The financing period for a qualifying facility during which previously approved capacity charges shall not be subject to commission reconsideration shall be 17.5 years, beginning with the date of commercial operation, for all qualifying facilities, except that the minimum financing period before reconsideration of the previously approved capacity charges shall be for

the duration of the financing for a qualifying facility which produces electric energy by the use of biomass, waste, wood, hydroelectric, wind, and other renewable resources, or any combination of renewable resources, as the primary energy source.

(c) Disallow net increased costs attributable to a generating plant outage of more than 90 days in duration unless the utility demonstrates by clear and satisfactory evidence that the outage, or any part of the outage, was not caused or prolonged by the utility's negligence or by unreasonable or imprudent management.

(d) Disallow transportation costs attributable to capital investments to develop a utility's capability to transport fuel or relocate fuel at the utility's facilities and disallow unloading and handling expenses incurred after receipt of fuel by the utility.

(e) Disallow the cost of fuel purchased from an affiliated company to the extent that such fuel is more costly than fuel of requisite quality available at or about the same time from other suppliers with whom it would be comparably cost beneficial to deal.

(f) Disallow charges unreasonably or imprudently incurred for fuel not taken.

(g) Disallow additional costs resulting from unreasonably or imprudently renegotiated fuel contracts.

(h) Disallow penalty charges unreasonably or imprudently incurred.

(i) Disallow demurrage charges.

(j) Disallow increases in charges for nuclear fuel disposal unless the utility has received the prior approval of the commission.

(14) In its order in a power supply cost reconciliation, the commission shall require a utility to refund to customers or credit to customers' bills any net amount determined to have been recovered over the period covered in excess of the amounts determined to have been actually expensed by the utility for power supply, and to have been incurred through reasonable and prudent actions not precluded by the commission order in the power supply and cost review. Such refunds or credits shall be apportioned among the customers of the utility utilizing procedures that the commission determines to be reasonable. The commission may adopt different procedures with respect to customers served under the various rate schedules of the utility and may, in appropriate circumstances, order refunds or credits in proportion to the excess amounts actually collected from each such customer during the period covered.

(15) In its order in a power supply cost reconciliation, the commission shall authorize a utility to recover from customers any net amount by which the amount determined to have been recovered over the period covered was less than the amount determined to have been actually expensed by the utility for power supply, and to have been incurred through reasonable and prudent actions not precluded by the commission order in the power supply and cost review. For excess costs incurred through management actions contrary to the commission's power supply and cost review order, the commission shall authorize a utility to recover costs incurred for power supply in the reconciliation period in excess of the amount recovered over the period only if the utility demonstrates by clear and convincing evidence that the excess expenses were

beyond the ability of the utility to control through reasonable and prudent actions. For excess costs incurred through management actions consistent with the commission's power supply and cost review order, the commission shall authorize a utility to recover costs incurred for power supply in the reconciliation period in excess of the amount recovered over the period only if the utility demonstrates that the level of such expenses resulted from reasonable and prudent management actions. Such amounts in excess of the amounts actually recovered by the utility for power supply shall be apportioned among and charged to the customers of the utility utilizing procedures that the commission determines to be reasonable. The commission may adopt different procedures with respect to customers served under the various rate schedules of the utility and may, in appropriate circumstances, order charges to be made in proportion to the amounts which would have been paid by such customers if the amounts in excess of the amounts actually recovered by the utility for cost of power supply had been included in the power supply cost recovery factors with respect to such customers during the period covered. Charges for such excess amounts shall be spread over a period that the commission determines to be appropriate.

(16) If the commission orders refunds or credits pursuant to subsection (14), or additional charges to customers pursuant to subsection (15), in its final order in a power supply cost reconciliation, the refunds, credits, or additional charges shall include interest. In determining the interest included in a refund, credit, or additional charge pursuant to this subsection, the commission shall consider, to the

extent material and practicable, the time at which the excess recoveries or insufficient recoveries, or both occurred. The commission shall determine a rate of interest for excess recoveries, refunds, and credits equal to the greater of the average short-term borrowing rate available to the utility during the appropriate period, or the authorized rate of return on the common stock of the utility during that same period. Costs incurred by the utility for refunds and interest on refunds shall not be charged to customers. The commission shall determine a rate of interest for insufficient recoveries and additional charges equal to the average short-term borrowing rate available to the utility during the appropriate period.

(17) To avoid undue hardship or unduly burdensome or excessive cost, the commission may:

(a) Exempt an electric utility with fewer than 200,000 customers in the state of Michigan from 1 or more of the procedural provisions of this section or may modify the filing requirements of this section.

(b) Exempt an energy utility organized as a cooperative corporation pursuant to sections 98 to 109 of Act No. 327 of the Public Acts of 1931, being sections 450.98 to 450.109 of the Michigan Compiled Laws, from 1 or more of the provisions of this section.

(18) Notwithstanding any other provision of this act, the commission may, upon application by an electric utility, set power supply cost recovery factors, in a manner otherwise consistent with this act, in an order resulting from a general rate case. Within 120 days following the effective date of this section, for the purpose of setting power supply cost recovery factors, the commission shall permit an electric utility to

reopen a general rate case in which a final order was issued within 120 days before or after the effective date of this section or to amend an application or reopen the evidentiary record in a pending general rate case. If the commission sets power supply cost recovery factors in an order resulting from a general rate case:

(a) The power supply cost recovery factors shall cover a future period of 48 months or the number of months which elapse until the commission orders new power supply cost recovery factors in a general rate case, whichever is the shorter period.

(b) Annual reconciliation proceedings shall be conducted pursuant to subsection (12) and if an annual reconciliation proceeding shows a recoverable amount pursuant to subsection (15), the commission shall authorize the electric utility to defer the amount and to accumulate interest on the amount pursuant to subsection (16), and in the next order resulting from a general rate case authorize the utility to recover the amount and interest from its customers in the manner provided in subsection (15).

(c) The power supply cost recovery factors shall not be subject to revision pursuant to subsection (10).

(19) Five years after the effective date of the amendatory act that added this subsection, and every 5 years thereafter, the standing committees of the house and senate that deal with public utilities shall review the amendatory act that added this subsection.

460.6k Initial power supply cost recovery plan; filing; alteration of rate schedule in accordance with adjustment clause; charges in excess of base rate; revenues subject to existing

reconciliation proceedings; revenues resulting from certain adjustment clauses subject to existing reconciliation proceedings; revenues subject to annual reconciliation; procedures; lag correction provision; adjustment of rates pending approval or disapproval of power supply cost recovery clause.

Sec. 6k. (1) This section shall govern the initial filing and implementation of a power supply cost recovery plan under section 6j(3).

(2) The initial power supply cost recovery plan may be for a period of less than 12 months and shall be filed:

(a) By an electric utility subject to commission rate jurisdiction with at least 200,000 residential customers in the state of Michigan, within 4 months after the effective date of this section.

(b) By all other electric utilities subject to commission rate jurisdiction, within 15 months after the effective date of this section in accordance with the provisions of this act which the commission determines to be appropriate for the individual utility.

(3) Notwithstanding section 6a(3), until the expiration of 3 months plus the remainder of the then current billing month following the last day on which a utility is required to file its first power supply cost recovery plan pursuant to subsection (2) of this section, the utility may alter its rate schedule in accordance with an existing fuel cost adjustment clause or purchased and net interchanged power adjustment clause. Thereafter, the utility may make charges in excess of base rates for the cost of power supply

pursuant only to subsections (2) and (4) of this section. After the effective date of this section, any revenues resulting from an existing fuel cost adjustment clause or purchased and net interchanged power adjustment clause and recorded for an annual reconciliation period ending prior to January 1, 1983, by an electric utility shall be subject to the existing reconciliation proceeding established by the commission for the utility. In this proceeding, the commission shall consider the reasonableness and prudence of expenditures charged pursuant to an existing fuel cost adjustment clause or purchased and net interchanged power adjustment clause after the effective date of this section. On and after January 1, 1983, all fuel cost and purchased and net interchanged power revenues received by an electric utility, whether included in base rates or collected pursuant to a fuel or purchased and net interchanged power adjustment clause or a power supply cost recovery clause, shall be subject to annual reconciliation with the cost of fuel and purchased and net interchanged power. Such annual reconciliations shall be conducted in accordance with the reconciliation procedures described in section 6j(12) to (18), including the provisions for refunds, additional charges, deferral and recovery, and shall include consideration by the commission of the reasonableness and prudence of expenditures charged pursuant to any fuel or purchased and net interchanged power adjustment clause in existence during the period being reconciled. If the utility has a lag correction provision included in its existing adjustment clauses, the commission shall allow any adjustment to rates attributable to such lag correction provision to be implemented for the 3 billing months

immediately succeeding the final billing month in which the existing adjustment clauses as operative.

(4) Until the commission approves or disapproves a power supply cost recovery clause in a final commission order in a contested case required by section 6j(2), a utility which had a fuel cost adjustment clause or purchased and net interchanged power adjustment clause on the effective date of this section and which has applied for a power supply cost recovery clause under section 6j may adjust its rates pursuant to section 6j(3) to (18), to include power supply cost recovery factors.

460.6l Insuring equitable representation of interests of energy utility customers; definitions; utility consumer participation board; creation; powers and duties; number and appointment of members; "utility" defined; member requirements; terms; vacancy; removal of member; meetings; quorum; election of chairperson and vice-chairperson; conducting business of board at public meeting; public notice; availability of writings to public; expense reimbursement and remuneration; limits; temporary administrator of fund.

Sec. 6l. (1) For purposes of implementing sections 6h, 6i, 6j, and 6k, this section and section 6m shall provide means of insuring equitable representation of the interests of energy utility customers.

(2) As used in this section and section 6m:

(a) "Annual receipts" means the payments received by the fund under section 6m(2)(a) and (b) during a calendar year.

(b) "Board" means the utility consumer participation board created under subsection (3).

(c) "Department" means the department of management and budget.

(d) "Energy cost recovery proceeding" means any proceeding to establish or implement a gas cost recovery clause or a power supply cost recovery clause as provided in sections 6h, 6i, 6j, or 6k, to set gas cost recovery factors pursuant to section 6h(17), or to set power supply cost recovery factors pursuant to section 6j(18).

(e) "Energy utility" means each electric or gas company regulated by the public service commission.

(f) "Fund" means the utility consumer representation fund created in section 6m.

(g) "Household" means a single-family home, duplex, mobile home, seasonal dwelling, farm home, cooperative, condominium, or apartment which has normal household facilities such as a bathroom, individual cooking facilities, and kitchen sink facilities. Household does not include a penal or corrective institution, or a motel, hotel, or other similar structure if used as a transient dwelling.

(h) "Jurisdictional" means subject to rate regulation by the Michigan public service commission.

(i) "Net grant proceeds" means the annual receipts of the fund less the amounts reserved for the attorney general's use and the amounts expended for board expenses and operation.

(j) "Residential energy utility consumer" or "consumer" means a customer of an energy utility who receives utility service for use within an individual

household or an improvement reasonably appurtenant to and normally associated with an individual household.

(k) "Residential tariff sales" means those sales by an energy utility which are subject to residential tariffs on file with the commission.

(l) "Utility consuming industry" means a person, sole proprietorship, partnership, association, corporation, or other entity which receives utility service ordinarily and primarily for use in connection with the manufacture, sale, or distribution of goods or the provision of services, but does not include a nonprofit organization representing residential utility customers.

(3) The utility consumer participation board is created within the department and shall exercise its powers and duties under this act independently of the department. The procurement and related management functions of the commission shall be performed under the direction and supervision of the department. The board shall consist of 5 members appointed by the governor, 1 of whom shall be chosen from 1 or more lists of qualified persons submitted by the attorney general.

(4) For the purposes of subsection (5) only, "utility" means an electric or gas company located in or outside of this state.

(5) Each member of the board shall meet the following requirements:

(a) Shall be an advocate for the interests of residential utility consumers, as demonstrated by the member's knowledge of and support for consumer

interests and concerns in general or specifically related to utility matters.

(b) Shall not be, or shall not have been within the 5 years preceding appointment, a member of a governing body of, or employed in a managerial or professional or consulting capacity by a utility or an association representing utilities; an enterprise or professional practice which received over $1,500.00 in the year preceding the appointment as a supplier of goods or services to a utility or association representing utilities; or an organization representing employees of such a utility, association, enterprise, or professional practice, or an association which represents such an organization.

(c) Shall not have, or shall not have had within 1 year preceding appointment, a financial interest exceeding $1,500.00 in a utility, an association representing utilities, or an enterprise or professional practice which received over $1,500.00 in the year preceding the appointment as a supplier of goods or services to a utility or association representing utilities.

(d) Shall not be an officer or director of an applicant for a grant under section 6m.

(e) Shall not be a member of the immediate family of a person who would be ineligible under subdivisions (a), (b), (c), or (d).

(6) The members of the board shall be appointed for 2-year terms beginning with the first day of a legislative session in an odd-numbered year and ending on the day before the first day of the legislative session in the next odd-numbered year or when the members' successors are appointed, whichever occurs later. The governor shall not appoint a member to the

board for a term commencing after the governor's term of office has ended. A vacancy shall be filled in the same manner as the original appointment. If the vacancy is created other than by expiration of a term, the member shall be appointed for the balance of the unexpired term of the member to be succeeded.

(7) The governor shall remove a member of the board if that member is absent for any reason from either 3 consecutive board meetings or more than 50% of the meetings held by the board in a calendar year. However, a person who is removed due to absenteeism is eligible for reappointment to fill a vacancy which occurs in the board membership. The governor also shall remove a member of the board if the member is subsequently determined to be ineligible under subsection (5).

(8) The board shall hold bimonthly meetings and additional meetings as necessary. A quorum consists of 3 members. A majority vote of the members appointed and serving is necessary for a decision. At its first meeting following the appointment of new members, or as soon as possible after the first meeting, the board shall elect biennially from its membership a chairperson and a vice-chairperson.

(9) The board shall not act directly to represent the interests of residential utility consumers except through administration of the fund and grant program under this section.

(10) The business which the board may perform shall be conducted at a public meeting of the board held in compliance with the open meetings act, Act No.

267 of the Public Acts of 1976, being sections 15.261 to 15.275 of the Michigan Compiled Laws. Public notice of the time, date, and place of the meeting shall be given in the manner required by Act No. 267 of the Public Acts of 1976.

(11) A writing prepared, owned, used, in the possession of, or retained by the board in the performance of an official function shall be made available to the public in compliance with the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

(12) A member of the board may be reimbursed for actual and necessary expenses, including travel expenses to and from each meeting held by the board, incurred in discharging the member's duties under this section and section 6m. In addition to expense reimbursement, a board member may receive remuneration from the board of $100.00 per meeting attended, not to exceed $1,000.00 in a calendar year. These limits shall be adjusted proportionately to an adjustment in the remittance amounts under section 6m(4) to allow for changes in the cost of living.

(13) Until the board certifies that it is operating and ready to perform all duties under this act, the director of the energy administration created by executive directives 1976-2 and 1976-5 shall serve as temporary administrator of the fund and exercise all duties and powers of the board.

460.6m Utility consumer representation fund; creation as special fund; investment and release of money; remittances by energy utility; factor; action for recovery of disputed amount; action on application for energy cost recovery proceedings; conditions; acceptance of gift or grant; payment of operating costs and expenses; net grant proceeds to finance grant program; application; form; consideration; encouraging representation of different consumer interests; criteria; inviting applicants to file jointly and awarding grant to be managed cooperatively; disbursements; notice of availability of fund; use of annual receipts and interest; retention of certain amounts; conditions applicable to grants; reports; reviewing relationship between costs and benefits.

Sec. 6m. (1) The utility consumer representation fund is created as a special fund. The state treasurer shall be the custodian of the fund and shall maintain a separate account of the money in the fund. The money in the fund shall be invested in the bonds, notes, and other evidences of indebtedness issued or insured by the United States government and its agencies, and in prime commercial paper. The state treasurer shall release money from the fund, including interest earned, in the manner and at the time directed by the board.

(2) Except as provided in subsection (6), each energy utility which has applied to the public service commission for the initiation of an energy cost recovery proceeding shall remit to the fund prior to or upon filing its initial application for such a proceeding, and

on or before the first anniversary of that application, an amount of money determined by the board in the following manner:

(a) In the case of an energy utility company serving at least 100,000 customers in this state, an amount which bears to $300,000.00, multiplied by a factor as provided in subsection (4), the same proportion as the company's jurisdictional 1981 total operating revenues, as stated in its annual report, bear to the jurisdictional 1981 total operating revenues of all energy utility companies serving at least 100,000 customers in this state. This amount shall be made available by the board for use by the attorney general for the purposes described in subsection (17).

(b) In the case of an energy utility company serving at least 100,000 residential customers in this state, an amount which bears to $300,000.00, multiplied by a factor as provided in subsection (4), the same proportion as the company's jurisdictional 1981 gross revenues from residential tariff sales bear to the jurisdictional 1981 gross revenues from residential tariff sales of all energy utility companies serving at least 100,000 residential customers in this state. This amount shall be used for grants under subsection (11).

(3) Payments made by an energy utility under subsection (2)(a) shall be operating expenses of the utility which the public service commission shall permit the utility to charge to its customers. Payments made by a utility under subsection (2)(b) shall be operating expenses of the utility which the public service commission shall permit the utility to charge to its residential customers.

(4) For purposes of subsection (2), the factor shall be set by the board at a level not to exceed the percentage increase in the index known as the consumer price index for urban wage earners and clerical workers, select areas, all items indexed, for the Detroit standard metropolitan statistical area, compiled by the bureau of labor statistics of the United States department of labor, or any successor agency, which has occurred between January 1981 and January of the year in which the payment is required to be made. In the event that more than 1 such index is compiled, the index yielding the largest payment shall be the maximum allowable factor. The board shall advise utilities of the factor.

(5) On or before the second and succeeding anniversaries of its initial application for an energy cost recovery proceeding, an energy utility shall remit to the board amounts equal to 5/6 of the amounts required under subsection (2).

(6) The remittance requirements of this section shall not apply to an energy utility organized as a cooperative corporation pursuant to sections 98 to 109 of Act No. 327 of the Public Acts of 1931, being sections 450.98 to 450.109 of the Michigan Compiled Laws, and grants from the fund shall not be used to participate in an energy cost recovery proceeding primarily affecting such a utility.

(7) In the event of a dispute between the board and an energy utility about the amount of payment due, the utility shall pay the undisputed amount and, if the utility and the board cannot agree, the board may initiate civil action in the circuit court for Ingham

county for recovery of the disputed amount. The commission shall not accept or take action on an application for an energy cost recovery proceeding from an energy utility subject to this section which has not fully paid undisputed remittances required by this section.

(8) The commission shall not accept or take action on an application for an energy cost recovery proceeding from an energy utility subject to this section until 30 days after it has been notified by the board or the director of the energy administration, if section 6*l*(13) is applicable, that the board or the director is ready to process grant applications, will transfer funds payable to the attorney general immediately upon the receipt of such funds, and will within 30 days approve grants and remit funds to qualified grant applicants.

(9) The board may accept a gift or grant from any source to be deposited in the fund if the conditions or purposes of the gift or grant are consistent with this section.

(10) The costs of operation and expenses incurred by the board in performing its duties under this section and section 6l, including remuneration to board members, shall be paid from the fund. A maximum of 5% of the annual receipts of the fund may be budgeted and used to pay expenses other than grants made under subsection (11).

(11) The net grant proceeds shall finance a grant program from which the board may award to an

applicant an amount which the board determines shall be used for the purposes set forth in this section.

(12) The board shall create and make available to applicants an application form. Each applicant shall indicate on the application how the applicant meets the eligibility requirements provided for in this section and how the applicant proposes to use a grant from the fund to participate in 1 or more proceedings as authorized in subsection (17) which have been or are expected to be filed. The board shall receive an application requesting a grant from the fund only from a nonprofit organization or a unit of local government in this state. The board shall consider only applications for grants containing proposals which are in keeping with subsections (17) and (18) and which serve the interests of residential utility consumers. For purposes of making grants, the board may consider protection of the environment, energy conservation, the creation of employment and a healthy economy in the state, and the maintenance of adequate energy resources. The board shall not consider an application which primarily benefits the applicant or a service provided or administered by the applicant. The board shall not consider an application from a nonprofit organization if 1 of the organization's principal interests or unifying principles is the welfare of a utility or its investors or employees, or the welfare of 1 or more businesses or industries, other than farms not owned or operated by a corporation, which receive utility service ordinarily and primarily for use in connection with the profit-seeking manufacture, sale, or distribution of goods or services. Mere ownership of securities by a nonprofit organization or its members

shall not disqualify an application submitted by that organization.

(13) The board shall encourage the representation of the interests of identifiable types of residential utility consumers whose interests may differ, including various social and economic classes and areas of the state, and if necessary, may make grants to more than 1 applicant whose applications are related to a similar issue to achieve this type of representation. In addition, the board shall consider and balance the following criteria in determining whether to make a grant to an applicant:

(a) Evidence of the applicant's competence, experience, and commitment to advancing the interests of residential utility consumers.

(b) In the case of a nongovernmental applicant, the extent to which the applicant is representative of or has a previous history of advocating the interests of citizens, especially residential utility consumers.

(c) The anticipated effect of the proposal contained in the application on residential utility consumers, including the immediate and long-term impacts of the proposal.

(d) Evidence demonstrating the potential for continuity of effort and the development of expertise in relation to the proposal contained in the application.

(e) The uniqueness or innovativeness of an applicant's position or point of view, and the probability and desirability of that position or point of view prevailing.

(14) As an alternative to choosing between 2 or more applications which have similar proposals, the

board may invite 2 or more of the applicants to file jointly and award a grant to be managed cooperatively.

(15) The board shall make disbursements pursuant to a grant in advance of an applicant's proposed actions as set forth in the application if necessary to enable the applicant to initiate, continue, or complete the proposed actions.

(16) Any notice to utility customers and the general public of hearings or other state proceedings in which grants from the fund may be used shall contain a notice of the availability of the fund and the address of the board.

(17) The annual receipts and interest earned, less administrative costs, may be used only for participation in administrative and judicial proceedings under sections 6h, 6i, 6j, and 6k, and in federal administrative and judicial proceedings which directly affect the energy costs paid by Michigan energy utilities. Amounts which have been in the fund more than 12 months may be retained in the fund for future grants, or may be returned to energy utility companies or used to offset their future remittances in proportion to their previous remittances to the fund, as the board determines will best serve the interests of consumers.

(18) The following conditions shall apply to all grants from the fund:

(a) Disbursements from the fund may be used only to advocate the interests of energy utility customers or classes of energy utility customers, and not for representation of merely individual interests.

(b) The board shall attempt to maintain a reasonable relationship between the payments from a particular energy utility and the benefits to consumers of that utility.

(c) The board shall coordinate the funded activities of grant recipients with those of the attorney general to avoid duplication of effort, to promote supplementation of effort, and to maximize the number of hearings and proceedings with intervenor participation.

(19) A recipient of a grant pursuant to subsection (11) may use the grant only for the advancement of the proposed action approved by the board, including, but not limited to, costs of staff, hired consultants and counsel, and research.

(20) A recipient of a grant under subsection (11) shall file a report with the board within 90 days following the end of the year or a shorter period for which the grant is made. The report shall be made in a form prescribed by the board and shall be subject to audit by the board. The report shall include the following information:

(a) An account of all grant expenditures made by the grant recipient. Expenditures shall be reported within the following categories:

(i) Employee and contract for services costs.

(ii) Costs of materials and supplies.

(iii) Filing fees and other costs required to effectively represent residential utility consumers as provided in this section.

(b) Any additional information concerning uses of the grant required by the board.

(21) The attorney general shall file a report with the house and senate committees on appropriations within 90 days following the end of each fiscal year. The report shall include the following information:

(a) An account of all expenditures made by the attorney general of funds received under this section. Expenditures shall be reported within the following categories:

(i) Employee and contract for services costs.

(ii) Costs of materials and supplies.

(iii) Filing fees and other costs required to effectively represent utility consumers as provided in this section.

(b) Any additional information concerning uses of the funds received under this section required by the committees.

(22) On or before July 1 of each calendar year, the board shall submit a detailed report to the legislature regarding the discharge of duties and responsibilities under this section and section 6l during the preceding calendar year.

(23) Three years after the effective date of this section, and at 3-year intervals thereafter, a senate committee chosen by the majority leader of the senate and a house committee chosen by the speaker of the house of representatives shall review the relationship between costs and benefits resulting from this section and sections 6h through 6*l*, and may recommend changes to the legislature.

APPENDIX K

ADMINISTRATIVE PROCEDURES ACT OF 1969
Act 306 of 1969

AN ACT to provide for the effect, processing, promulgation, publication, and inspection of state agency rules, determinations, and other matters; to provide for the printing, publishing, and distribution of certain publications; to provide for state agency administrative procedures and contested cases and appeals from contested cases in licensing and other matters; to create and establish certain committees and offices; to provide for declaratory judgments as to rules; to repeal certain acts and parts of acts; and to repeal certain parts of this act on a specific date.

CHAPTER 1 GENERAL PROVISIONS

24.201 Administrative procedures; short title.

Sec. 1. This act shall be known and may be cited as the "administrative procedures act of 1969".

24.203 Definitions; A to G.

Sec. 3. (1) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.

(2) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.

(3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are deemed to be a continuous proceeding as though before a single agency.

(4) "Committee" means the joint committee on administrative rules.

(5) "Court" means the circuit court.

(6) "Guideline" means an agency statement or declaration of policy which the agency intends to follow, which does not have the force or effect of law, and which binds the agency but does not bind any other person.

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CHAPTER 4
PROCEDURES IN CONTESTED CASES

24.271 Parties in contested case; time and notice of hearing; service of notice or other process on legislator.

Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(a) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

(3) A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which there is a scheduled meeting of the house of which he

or she is a member. However, a member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter on a day on which there is a scheduled meeting of the house of which he or she is a member, if such service of notice or process is executed by certified mail, return receipt requested.

24.272 Defaults, written answers, evidence, argument, cross-examination.

Sec. 72. (1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.

(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.

24.273 Subpoenas; issuance; revocation.

Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith

requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

24.274 Oaths; depositions; disclosure of agency records.

Sec. 74. (1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take depositions. A deposition may be used in lieu of other evidence when taken in compliance with the general court rules. An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

(2) An agency that relies on a witness in a contested case, whether or not an agency employee,

who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

24.275 Evidence; admissibility, objections, submission in written form.

Sec. 75. In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

24.275a Definitions; hearing where witness testifies as alleged victim of sexual, physical, or psychological abuse; use of dolls or mannequins; support person; notice; ruling on objection; exclusion of persons not necessary to

proceeding; section additional to other protections or procedures.

Sec. 75a. (1) As used in this section:

(a) "Developmental disability" means that term as defined in section 100a of the mental health code, 1974 PA 258, MCL 330.1100a except that, for the purposes of implementing this section, developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment.

(b) "Witness" means an alleged victim under subsection (2) who is either of the following:

(i) A person under 16 years of age.

(ii) A person 16 years of age or older with a developmental disability.

(2) This section only applies to a contested case in which a witness testifies as an alleged victim of sexual, physical, or psychological abuse. As used in this subsection, "psychological abuse" means an injury to the witness's mental condition or welfare that is not necessarily permanent but results in substantial and protracted, visibly demonstrable manifestations of mental distress.

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be served upon all parties to the proceeding. The agency shall rule on any objection to the use of a named support person prior to the date at which the witness desires to use the support person.

(5) In a hearing under this section, all persons not necessary to the proceeding shall be excluded during the witness's testimony.

(6) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

24.276 Evidence to be entered on record; documentary evidence.

Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the

materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

24.277 Official notice of facts; evaluation of evidence.

Sec. 77. An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

24.278 Stipulations; disposition of cases, methods.

Sec. 78. (1) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

(2) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

24.279 Presiding officers; designation; disqualification, inability.

Sec. 79. An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

24.280 Presiding officer; powers and duties; "nonmeeting day" defined.

Sec. 80. (1) A presiding officer may do all of the following:

(a) Administer oaths and affirmations.

(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

(e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

(f) Act upon an application for an award of costs and fees under sections 121 to 127.

(2) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party in a contested case is a member of the legislature of this state, and the legislature is in session, the contested case shall be continued by the presiding officer to a nonmeeting day.

(3) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.

(4) In order to assure adequate representation for the people of this state, when the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after

the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet the contested case need not be continued, but the taking of the legislator's testimony, as a witness shall be postponed to the earliest practicable nonmeeting day.

(5) The presiding officer shall notify all parties to the contested case, and their attorneys, of any continuance granted pursuant to this section.

(6) As used in this section, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.

24.281 Proposals for decision; contents.

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of

fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

24.282 Communications by agency staff; limitations; exceptions.

Sec. 82. Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section

does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or the public service commission insofar as the case involves rate-making or financial practices or conditions.

24.285 Final decision and order.

Sec. 85. A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law separated into sections captioned or entitled "findings of fact" and "conclusions of law", respectively. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact that would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material, and substantial evidence. A copy of the decision or order shall be delivered or mailed immediately to each party and to his or her attorney of record.

24.286 Official records of hearings.

Sec. 86. (1) An agency shall prepare an official record of a hearing which shall include:

(a) Notices, pleadings, motions and intermediate rulings.

(b) Questions and offers of proof, objections and rulings thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

(e) Proposed findings and exceptions.

(f) Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

(2) Oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who shall pay for the transcription of the portion requested except as otherwise provided by law.

24.287 Rehearings.

Sec. 87. (1) An agency may order a rehearing in a contested case on its own motion or on request of a party.

(2) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of judicial review, the agency on its own motion or on request of a party shall order a rehearing.

(3) A request for a rehearing shall be filed within the time fixed by this act for instituting proceedings for judicial review. A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.

* * *

APPENDIX L

CONSTITUTION OF 1963

Art. 6, § 28

§ 28. Administrative action, review

Sec. 28. All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

Property tax valuation or allocation; review

In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.

APPENDIX M

MICHIGAN RULES OF COURT

STATE

2008

Rule 7.215 Opinions, Orders, Judgments, and Final Process from Court of Appeals

* * *

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

* * *

(J) Resolution of Conflicts in Court of Appeals Decisions.

(1) *Precedential Effect of Published Decisions.* A panel of the Court of Appeals must follow the rule of

law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

(2) *Conflicting Opinion.* A panel that follows a prior published decision only because it is required to do so by subrule (1) must so indicate in the text of its opinion, citing this rule and explaining its disagreement with the prior decision. The panel's opinion must be published in the official reports of opinions of the Court of Appeals.

(3) *Convening of Special Panel.*

(a) Poll of Judges. Except as provided in subrule (3)(b), within 28 days after release of the opinion indicating disagreement with a prior decision as provided in subrule (2), the chief judge must poll the judges of the Court of Appeals to determine whether the particular question is both outcome determinative and warrants convening a special panel to rehear the case for the purpose of resolving the conflict that would have been created but for the provisions of subrule (1). Special panels may be convened to consider outcome-determinative questions only.

(b) Effect of Pending Supreme Court Appeal. No poll shall be conducted and a special panel shall not be convened if, at the time the judges are required to be polled, the Supreme Court has granted leave to appeal in the controlling case.

(c) Order. Immediately following the poll, an order reflecting the result must be entered. The chief clerk of the Court of Appeals must provide a

copy of the order to the Clerk of the Supreme Court. The order must be published in the official reports of opinions of the Court of Appeals.

(4) *Composition of Panel.* A special panel convened pursuant to this rule consists of 7 judges of the Court of Appeals selected by lot, except that judges who participated in either the controlling decision or the opinion in the case at bar may not be selected.

(5) *Consideration of Case by Panel.* An order directing the convening of a special panel must vacate only that portion of the prior opinion in the case at bar addressing the particular question that would have been decided differently but for the provisions of subrule (1). The special panel shall limit its review to resolving the conflict that would have been created but for the provisions of subrule (1) and applying its decision to the case at bar. The parties are permitted to file supplemental briefs, and are entitled to oral argument before the special panel unless the panel unanimously agrees to dispense with oral argument. The special panel shall return to the original panel for further consideration [of] any remaining, unresolved issues, as the case may require.

(6) *Decision.* The decision of the special panel must be by published opinion or order and is binding on all panels of the Court of Appeals unless reversed or modified by the Supreme Court.

(7) *Reconsideration; Appeal.* There is no appeal from the decision of the Court of Appeals as to whether to convene a special panel. As to the decision in the case at bar, the time limits for moving for

reconsideration or for filing an application for leave to appeal to the Supreme Court run from the date of the order declining to convene a special panel or, if a special panel is convened, from the date of the decision of the special panel, except that, if the case is returned to the original panel for further consideration in accordance with subrule (5), the time limits shall run from the date of the original panel's decision, after return from the special panel. If a motion for reconsideration is filed, it shall be submitted to the special panel, which, if appropriate, may refer some or all of the issues presented to the original panel.